Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ANGEL DIAZ, *et al.*,

Appellees,

vs.

SHELDON SILVER, in his official capacity as Speaker of the House for the Assembly of the State of New York, *et al.*,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the district court erred in using an "effects" test rather than the appropriate legislative "motivation" test in finding New York's 12th Congressional District unconstitutional.

2. Whether the district court erred in granting summary judgment and impermissibly engaged in fact finding rather than issue finding when it found New York's 12th Congressional District unconstitutional without the benefit of an evidentiary hearing or trial.

3. Whether the district court erred in failing to accord full faith and credit to the 1992 *Reid* state court judgment when the parties would have been bound by *res judicata* under New York state law.

PARTIES TO THE PROCEEDINGS

The appellant is defendant below Sheldon Silver, Speaker of the New York State Assembly.

The appellees are plaintiffs below Angel Diaz, Denise L. Motley and Reynaldo Coholo.

Other defendants below are Joseph L. Bruno, President Pro Tem and Majority Leader of the New York State Senate, George E. Pataki, Governor of the State of New York; the Board of Elections of the State of New York; Owen T. Smith, Evelyn J. Aquila, and Helena M. Donohue, Commissioners of the Board of Elections of the State of New York and various unknown and unnamed John Does.

The intervenors below are Delco L. Cornett; Margarita Lopez; Louis Garden Acosta; Peter Lau; John Kuo Wei Tchen; Congresswoman Nydia Velazquez; Congressman Major R. Owens; Congresswoman Carolyn B. Maloney.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The unreported opinion and judgment of the three-judge district court is reproduced in the separately bound appendix to this jurisdictional statement ("J.S. App.") at A-1 and A-78.

JURISDICTION

The final judgment of the three-judge district court from which appeal is taken granted plaintiff summary judgment, declared New York's 12th Congressional District unconstitutional and ordered the New York State Legislature to develop

on or before July 30, 1997 a new Congressional Districting Plan. Speaker Silver's notice of appeal was filed on March 25, 1997 (J.S. App. A-81). The Court has jurisdiction pursuant to 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The relevant federal statutory provisions are § 2 and § 5 of the Voting Rights Act of 1965 as amended, 42 U.S.C. §§ 1973, 1973c, the pertinent parts of which are reproduced at J.S. App. A-83-85. The state statute creating the Congressional Districting Plan at issue is Chapters 137 and 138 of the New York State Laws of 1992.

STATEMENT

Prior Proceedings

The results of the 1990 census required that New York's Congressional delegation be reduced from 34 to 31 members. The partisan division between the Republican majority of the New York State Senate and the Democratic majority of the New York State Assembly had complicated efforts at agreement, as a result of which the Legislature was unable to pass a districting plan within the time constraints of the original election calendar.

(i) The *Reid* State Court Action/Referees' Plan

Thereafter, an action was brought before the Supreme Court of the State of New York, County of Kings, entitled *Reid v. Marino*, Index No. 9567/92 (the "*Reid* action"), in which the plaintiffs asked the court to adopt a constitutionally valid plan. Three referees were appointed by the *Reid* court to conduct hearings and propose a districting plan.

Both houses of the State Legislature were defendants in the *Reid* action. Each advocated a different districting plan.

Preliminary maps of the referees' districting plan were presented at a hearing before the state court on June 2, 1992, and the referees' final report recommending a districting plan was issued on June 4, 1992. The *Reid* court's judgment adopting the referees' plan, which was "to govern the election of Members of Congress at the November 1992 election and subsequent elections," was issued on June 8, 1992.

(ii) The *PRLDEF* Federal Court Action/Lacey Plan

Shortly after the commencement of the *Reid* action, a second action, entitled *Puerto Rican Legal Defense and Education Fund, Inc. v. Gantt*, Civil Action No. 92-1521 (SJ, GCP, JSM) (the "*PRLDEF* action"), seeking virtually the same relief, was brought before a three-judge federal court in the United States District Court for the Eastern District of New York. Both houses of the state legislature were defendants in the *PRLDEF* action. As in *Reid*, each house advocated its own distinct districting plan.

By Order dated May 12, 1992, the three-judge court named Frederick B. Lacey, a former federal judge from New Jersey, as a Special Master to redraw New York's Congressional district lines. The court ordered him to submit his plan for redistricting on May 26, 1992, or as soon thereafter as he was able to complete a plan that complied with the requirements of law. Judge Lacey proposed a Congressional districting plan on or about May 27, 1992 ("The Lacey Plan").

On June 3, 1992 the *PRLDEF* court conducted a hearing at which it indicated that it would impose the Lacey Plan unless the legislature enacted a districting plan by June 10, 1992 and had that plan precleared by the Justice Department pursuant to § 5 of the Voting Rights Act.

The primary difference in the districting criteria used by the *Reid* court referees and Judge Lacey was that the referees took incumbency into account, while Judge Lacey bluntly stated in his Report to the *PRLDEF* Court:

> the concept of preserving seats of incumbents, *and the concerns of incumbency were not included in my hierarchy of guiding principles.*

(iii) The Legislature's Actions

As evidenced by their advocacy before the *Reid* and *PRLDEF* courts, both houses of the legislature had an abiding interest in protecting incumbency and the resultant seniority of the members of New York's Congressional delegation, particularly in light of the fact that New York's delegation was to be reduced by three seats. Both the Senate and the Assembly were of the view that the Lacey Plan would devastate incumbency.[1]

In light of the *PRLDEF* court's declaration that it would impose the Lacey Plan if the legislature did not enact a plan, the legislature had only two choices. It could do nothing and jeopardize the incumbency of New York's Congressional delegation with the resultant Lacey Plan; alternatively, it could enact a plan of its own. However, in view of the binding effect of the *Reid* judgment, the state court *Reid* plan was the only option available to the legislature.

In light of the legislature's overarching goal of protecting incumbents, the legislature was faced with an unpalatable, but extremely limited choice compelled by the federal court's edict imposing the Lacey Plan if the legislature did not itself enact a plan and have that plan precleared before June 10, 1992: (a) the Legislature could do nothing and allow the *PRLDEF* court to impose the Lacey Plan and destroy the incumbency and concomitant seniority of the already reduced numbers of New York's Congressional delegation; (b) alternatively, the legislature could enact the plan incorporated in the *Reid* judgment. That state court *Reid* plan, although disfavored by the legislature in many respects, was not, in the

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[1] The *PRLDEF* court itself noted the Legislature's "vehement dislike" for the Lacey Plan. *PRLDEF v. Gantt*, 796 F. Supp. 681, 697 (E.D.N.Y. 1992).

legislature's view, as destructive of incumbency as was the Lacey Plan. However, as parties to the *Reid* action bound to its judgment, the Senate and Assembly could only act to adopt the totality of the *Reid* plan; the legislature could not change the state court plan in any way. Motivated primarily, if not solely, by considerations of incumbency, including the avoidance of the pairing of incumbents and the preservation of core constituencies, the leaders of the two houses of the legislature, who had previously been unable to agree upon a districting plan, agreed to enact the state court *Reid* plan which addressed in part the legislature's incumbency concerns. The legislature chose to enact the *Reid* plan in order to protect incumbency from the destruction that it believed would have resulted from imposition of the Lacey Plan.

Therefore, as evidenced by the affidavits of persons integrally involved in the districting process, including the legislative leaders themselves, and as corroborated by contemporaneous newspaper reports, the predominant motivation of the legislature in enacting the *Reid* plan was to protect incumbents.

Accordingly, on June 8, 1992, the State Senate passed a bill enacting the redistricting plan incorporated in the *Reid* judgment. On June 9, 1992, the State Assembly enacted the same bill. On or about June 12, 1992, the Governor signed into law the congressional redistricting bill that had been passed by the two houses of the legislature.

THE QUESTIONS ARE SUBSTANTIAL

I. THE DISTRICT COURT'S DECISION AND JUDGMENT FAILED TO APPLY THE APPROPRIATE LEGAL STANDARD SET FORTH IN THIS COURT'S GOVERNING AUTHORITIES WHEN IT FOUND THAT THE PREDOMINANT LEGISLATIVE MOTIVE FOR DRAWING THE 12TH CONGRESSIONAL DISTRICT WAS IMPERMISSIBLY RACIAL.

A. The Need To Show A Racially Discriminatory Purpose Or Motivation In Order To Sustain An Equal Protection Claim

"The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). "*[P]urposeful discrimination* is 'the condition that offends the Constitution.'" *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 [1971])(emphasis added). *See also Shaw v. Reno*, 509 U.S. 630, 642 (1993)("*Shaw I*")(the Equal Protection Clause's "*central purpose* is to prevent the States from *purposefully discriminating* between individuals on the basis of race")(emphasis added).

Thus, to show a violation of the Equal Protection Clause, "[p]roof of racially discriminatory *intent or purpose* is required . . . ." *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977)(emphasis added).

As this Court stated in *Miller v. Johnson*, 115 S. Ct. 2475 (1995), "[t]he plaintiff's burden is to show . . . that race was the predominate factor *motivating* the legislature's decision . . . ." *Id.* at 2488 (emphasis added). Further, this Court noted in *Shaw v. Hunt*, 116 S. Ct. 1894 (1996)("*Shaw II*") that "[t]he constitutional wrong occurs when race becomes the 'dominant and controlling' *consideration*." *Id.* at 1900

(emphasis added). *See also Bush v. Vera*, 116 S. Ct. 1941, 1951-52 (1996) ("[f]or strict scrutiny to apply . . . race must be '*the predominant* factor *motivating* the legislature's [redistricting] decision'")(citation omitted; emphasis added and in original).

B. The Overwhelming Evidence As To The Legislature's Predominant Motive Of Incumbency Protection

The New York State Legislature demonstrated to the district court that the legislature's predominant motivation in enacting the plan containing the 12th Congressional District had nothing to do with race and everything to do with a traditional districting factor, namely incumbency.[2]

As described more fully *supra*, it was (1) the *PRLDEF* court's unwillingness to (a) defer to the state court proceedings and (b) give full faith and credit to the *Reid* judgment and (2) the *PRLDEF* court's insistence that only a legislative plan would forestall implementation of the Lacey Plan, that triggered the legislature to enact the *Reid* court plan. But for the presumptive position taken by the *PRLDEF* court, there would have been nothing motivating the legislature to take such action. Indeed, as previously stated, the legislature was bound by the judgment of the *Reid* court at the time legislative action on the plan embodied therein was taken.

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[2] As Justice O'Connor noted in her separate concurrence in *Bush v. Vera*, 116 S. Ct. 1941, citing to earlier decisions of the Court, "[o]nly if traditional districting criteria are neglected *and* that neglect is predominantly due to the misuse of race does strict scrutiny apply." *Id.* at 1969 (emphasis added). Here, the overwhelming evidence shows that the Legislature did not "neglect" traditional districting criteria in deference to race in enacting the districting plan. Rather, the Legislature's primary motivation here in enacting the *Reid* court's plan was to protect incumbency, a long recognized, "race-neutral," traditional districting criterion. *See Bush*, 116 S. Ct. at 1954; *cf. Gaffney v. Cummings*, 412 U.S. 735, 753 (1973)("The reality is that districting inevitably has and is intended to have substantial political consequences.")

The consequence of the *PRLDEF* court's actions was to put the legislature in the position of either enacting the state court plan (whose terms it could not vary) or doing nothing and risking the imposition of a federal court plan that was destructive of incumbency protection.

The motivation that compelled the legislature to act to protect incumbency was thus triggered by the *PRLDEF* court's intention to impose the Lacey Plan in the absence of legislative action. The legislature's decision to take any action at all was caused by the federal court's intrusion into the state's districting process and was thus wholly separate and apart from any motivation that the state court referees might have had in crafting the districting plan.

Indeed, the district court conceded that

> [t]here is also no question that the Legislature likewise considered incumbency; nor was there anything improper in its doing so. The legislators voiced their quite legitimate concerns about the ability of representatives to maintain relationships they had already developed with their constituents. More significantly, the powerful role that seniority plays in the functioning of Congress makes incumbency an important and legitimate factor for a legislature to consider.

J.S. App. A-56 (citation omitted).

Nevertheless, the district court concluded that race predominated over incumbency in the creation of the 12th Congressional District stating:

> The important role that incumbency played is best summarized as follows: only when the perceived racial requirements of the VRA were met did incumbency become the *principal focus of the referees' plan*, and incumbency was always sacrificed to meet these racial requirements. Incumbency was always secondary to race.

J.S. App. A-57 (emphasis added).

In reaching their conclusion that race and not incumbency predominated in the creation of the 12th Congressional District, the district court thus focused exclusively on the *referees' intent* and utterly ignored the overwhelming direct and uncontradicted testimonial evidence that the *legislature's motive* in acting was incumbency protection and not race.

Specifically, the district court completely disregarded the testimony of Ralph Marino, the State Senate Majority Leader and President *pro tem* of the New York State Senate[3] that Republicans in the State Senate believed that the Lacey Plan would have a negative impact upon the political interests of their party including their interest in protecting incumbents. J.S. App. A-87.

Similarly scorned by the district court was the direct testimony of Benjamin Chevat, Chief Counsel to the Speaker of the New York State Assembly[4] who testified from personal knowledge that:

> [I]n the opinion of Speaker Weprin and the Assembly majority, *the plan crafted by Special Master Lacey . . . was completely destructive of incumbency and, in our opinion, would have caused the defeat of many Democratic incumbents and resulted in the loss of their influence and power based upon their seniority in Congress.*
>
> * * *
>
> [T]he primary and overwhelming motivation of the Assembly in passing the redistricting plan incorporated in the *Reid* judgment was to protect

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[3] As discussed, *infra* at p. 19, n.7, the Senate Majority Leader is the individual who unilaterally controls all legislation passed in the Senate.

[4] Saul Weprin the Assembly Speaker at the time the bill was passed died prior to the commencement of the instant law suit.

> Congressional incumbency by acting to prevent the Lacey plan from being ordered by the *PRLDEF* court.

J.S. App. A-89 (emphasis added).

Also not discussed by the district court is the fact that Mr. Chevat's affidavit was corroborated by Roman Hedges, a member of the Legislative Task Force on Demographic Research and Reapportionment, appointed by the Speaker of the Assembly.

A massive number of contemporaneous news reports detailing the fear and anxiety of the legislature in respect of the Lacey Plan and the concomitant legislative motive in enacting the *Reid* plan as its only viable alternative was submitted to the district court and likewise ignored by it. A small number of representative examples follow:

On June 2, 1992, the New York Times reported:

> Adding a new twist to the tangle of Congressional redistricting in New York, a panel appointed by a *state court today released a plan that would provide substantially more protection for more incumbents than a competing plan proposed last week in a Federal court.*
>
> * * *
>
> *The Republican Senator who is a co-chairman of the Legislature's redistricting panel, Dean G. Skelos of Nassau County, said in a telephone interview tonight that the Senate majority leader, Ralph J. Marino, had reacted favorably to the state court plan because it could help insure New York's delegation of maximum seniority in Congress in a year when many incumbents were retiring in other states.*

Sam H. Verhovek, *New York Court Throws a State Plan Into Redistricting Fray*, N.Y. Times, June 2, 1992 at B1 (emphasis added).

On June 3, 1992, the New York Times reported:

> After months of political paralysis, the Republican leader of the State Senate suddenly urged the Legislature today to pass a Congressional redistricting plan that was designed by a state court panel.
>
> *The urgent call for action by the Senate majority leader, Ralph J. Marino, an Oyster Bay Republican, was an effort to pre-empt a panel of Federal judges who could decide as early as Wednesday to impose their own redistricting plan. Officials with the Republican-led Senate, the Democratic-majority Assembly, and the state's 34-member Congressional delegation said today that governmental leaders generally agree that the state court plan is more advantageous for incumbents than the Federal court plan.*
>
> * * *
>
> *Legislative leaders from both parties agreed that the Lacey plan would wreak havoc with incumbent members of Congress.*

Kevin Sack, *G.O.P. Leader Supports State Court District Plan*, N.Y. Times, June 3, 1992 at B4 (emphasis added).

On June 4, 1992, the New York Times reported:

> In United States District Court in Brooklyn yesterday, a three-judge panel announced after a day long hearing that *it would give the Legislature one week to pass the state court plan or risk the court-ordered imposition of the Federal plan.* Yesterday's developments make it likely that the Legislature will do just that.
>
> * * *
>
> *[T]he plan [the Lacey plan] generated chaos in the Congressional delegation by setting up prospective contests between prominent incumbents. . . .*

Kevin Sack, *Albany Legislators Agree On Plan For Revised Congressional Lines*, N.Y. Times, June 4, 1992 at A1 (emphasis added).

Also, on June 4, 1992, the Daily News reported:

> Assembly Speaker Saul Weprin (D-Queens) ended the months-long Albany paralysis by *reluctantly accepting a plan crafted by referees* appointed by a Brooklyn Supreme Court justice.
>
> The same plan got a green light Tuesday from Senate Majority Leader Ralph Marino (R-Nassau).
>
> "*(The referees' plan) is not our preference*, but if the Senate passes it, we will," Weprin said through a spokesman.
>
> * * *
>
> Both houses are drafting redistricting bills and a vote could come as early as Monday. If signed by Gov. Cuomo, the redistricting plan would still have to pass muster with the Justice Department.
>
> *Weprin's move was announced during a hearing in Brooklyn Federal Court dealing with a rival federally drawn proposal that, if enacted, would have hit the current incumbents like a political hand grenade.*

Joel Benenson and Frank Lombardi, *Referees' District Plan Okd*, Daily News, June 4, 1992 at C11 (emphasis added).

The district court did not find these contemporaneous news accounts of the legislature's motives worthy of comment.

In sum, the district court did not address or deal with any of the foregoing overwhelming direct evidence of the legislature's desire to protect incumbency as the moving force in passing the New York State Congressional Districting Plan.

C. The District Court's Erroneous Employment Of The Effects Test

Thirty years of this Court's decisions to the contrary notwithstanding, the district court analyzed the legislature's actions under an erroneous "effects test" legal standard instead of the applicable subjective motivation test commanded by this Court's binding precedents.

The district court's opinion ascribes a predominant racial motivation to the legislature's action because the legislature was "aware" of the race based motivation of the *Reid* court referees.

> The legislature *was fully aware* of the perceived need to create majority-minority districts within New York City.

J.S. App. A-48 (emphasis added).

Similarly, the district court echoes that theme in its heading "The Legislature's *Acquiescence* in the Use of Race." J.S. App. A-50 (emphasis added).

However, established equal protection jurisprudence holds that a legislature's awareness that a law, if enacted, will have a racial impact, standing alone, does *not* establish a discriminatory purpose. To establish a violation of the Equal Protection Clause, a claimant must prove that the legislature enacted the law precisely "because of" its racial effects. *See Miller*, 115 S. Ct. at 2488; *Feeney*, 422 U.S. at 279.

In *Feeney*, Massachusetts had enacted a civil service law that gave a life-long preference to veterans. The plaintiffs challenged the law under the Equal Protection Clause of the Fourteenth Amendment on the ground that the statute had a disparate impact upon women since, among other reasons, more than 98 percent of veterans within the state were male. Plaintiffs argued, as the district court held here, that the state legislature's awareness of the discriminatory consequences of the legislation sufficed to establish the requisite

discriminatory intent. *Id.* at 278. Plaintiffs in *Feeney* were wrong (as is the district court here).

In *Feeney* this Court squarely addressed the issue of the legislature's awareness of the discriminatory effects of the veteran's preference statute on women. In fact, the two dissenting justices in *Feeney* observed that the legislative history of the statute reflected the State's "patent appreciation of the impact the preference system would have on women . . . ." 442 U.S. at 284. A concurring opinion by the lower court similarly observed that since "'the cutting off of women's opportunities was an inevitable concomitant of the chosen scheme,'" the result must be deemed to have been intended by the legislature. *Id.* at 278.

This Court disagreed that legislative awareness and acquiescence in the inevitability of discriminatory consequences are determinative of legislative purpose under the Fourteenth Amendment. Acknowledging that the state legislature must have been aware that most veterans are male and that the statute would therefore have adverse consequences for women, this Court expressly rejected the argument that knowledge of a statute's discriminatory effects establishes a discriminatory legislative purpose. This Court stated:

> "*Discriminatory purpose,*" . . . *implies more than intent as volition or intent as awareness of consequences.* . . . [N]othing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted *because* it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachussets Civil Service.

Id. at 279 (citations and footnote omitted; emphasis added).

The principle that "awareness" of the discriminatory effects of a statute is not determinative of a discriminatory legislative purpose in enacting the statute was squarely reiterated by this Court in the districting context in *Miller*. There, the Court quoted its *Feeney* precedent and went on to admonish:

> The *distinction between being aware of racial considerations and being motivated by them* may be difficult to make.

115 S. Ct. at 2488 (emphasis added).

Accordingly, it is clear that a legislature's knowledge that a law, if enacted, will have a racially disproportionate effect does not, standing alone, establish discriminatory purpose. *See Miller*, 115 S. Ct. at 2488; *Feeney*, 442 U.S. at 279.

Similarly, the legislature here cannot be charged with an improper motivation in enacting the *Reid* court's plan, irrespective of the factors that may have motivated the court-appointed referees in drawing this plan. The reason is that there is no evidence at all that the legislature enacted the referees' plan "because of" the racial composition of any of the districts therein, including the 12th Congressional District. The factors considered by the state court referees in drawing the districts comprising the *Reid* court plan simply are not determinative of the legislature's motivation in adopting the plan. Here, the evidence is overwhelming that the legislature enacted the *Reid* court's plan, a plan embodied in a judgment it could not vary, primarily to avoid the imposition of the incumbency-destroying Lacey Plan. The legislature's primary motivation was to protect incumbency; not draw districts on the basis of race.

The district court ascribed the requisite dominant racial motivation of the legislature by reason of the legislature's submission to the Justice Department of the Referees' Report as part of its § 5 preclearance requirements

> whatever their non-racial concerns, by attaching the referees' report to their Department of Justice preclearance submission, the Legislature affirmatively adopted the race-based methodology and rationale the referees used to create the plan.

J.S. App. A-50.

The clear import of the district court's assertion is that the mere fact that the legislature used the referees' report in its submission to the Justice Department, *ipso facto*, imputes an impermissible racial motivation to the legislature. To the contrary, the submission of racial data is probative only of the legislature's desire to comply responsively with the State's preclearance obligation pursuant to § 5 of the Voting Rights Act; it is not probative of the legislature's intent underlying the adoption of the plan that it submitted.

The district court's contention is directly contrary to governing authority of this Court. Section 5 of the Voting Rights Act has explicitly been declared constitutional by this Court in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). Section 5 of the Voting Rights Act, applicable to "covered" jurisdictions such as New York, requires that the state obtain "preclearance" of any "'standard, practice, or procedure with respect to voting,'" including Congressional districting plans, by showing that the proposed change does "'not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.' 42 U.S.C. 1973c." *Miller*, 115 S. Ct. at 2483.[5] Thus, by definition, § 5 retrogression analysis implicates the submission and analysis of racial data since by its very terms, it requires that the legislature discuss racial characteristics of districting plans.

Indeed, the regulations promulgated by the Justice Department under § 5 of the Voting Rights Act require that "covered" jurisdictions seeking preclearance set forth, among other things, "[a] statement of the reasons for the change," "[a] statement of the anticipated effect of the change on members of racial or language minority groups," and "[a] statement identifying any past or pending litigation concerning the change or related voting practice." Procedures For The

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[5] The *PRLDEF* court itself required that the legislature make such a § 5 submission and obtain preclearance, in the absence of which the *PRLDEF* court had announced its intention to install the Lacey Plan. The *PRLDEF* court so ruled despite the fact that the *Reid* court plan existed in the form of a judgment binding upon the legislature.

Administration of Section 5 Of The Voting Rights Act of 1965, As Amended ("VRA Procedures"), 28 C.F.R. § 51.27 (1995).[6] By attaching to its § 5 submission the referees' report (which sets forth the history of the litigation and reasons for the change in districting, and describes the plan and its anticipated effect upon protected minorities), the legislature simply was addressing the requirements of the governing federal regulations.

Nothing in the referees' report speaks to the legislature's motivation. Indeed, at the time the referees' report was issued the legislature had not acted as a body. Patently then, mere submission of racial data by the legislature via the referees' plan, in the unique factual circumstances of this case as described at length *supra*, cannot be the basis of a finding that this legislature was motivated primarily by race in enacting the districting plan in question. Obviously, no adverse implications can be drawn from such a submission as it implicates only the legislature's awareness of race, not that race was the legislature's predominant motive.

The district court also expends considerable effort knocking down the straw man argument that the legislature sought to excuse its alleged constitutional violation on the grounds that the "Justice Department made us do it."

> [I]n cases of racial gerrymandering, such as the one before this court, a legislature will be held responsible for the resulting constitutional violations in *spite of contentions that the legislature was merely attempting to comply with the perceived maximization requirements of the Justice Department.*

J.S. App. A-50 (emphasis added).

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[6] In addition, those regulations recommend the submission of demographic information concerning race as a means of "facilitat[ing]" review by the Attorney General. VRA Procedures, 28 C.F.R. § 51.28 (1995).

> The Legislature must bear responsibility for the constitutional violations in its plans, even if its actions were a consequence of pressure imposed by DOJ's erroneous interpretation of the VRA.

J.S. App. A-55.

> But the Supreme Court has not responded kindly to legislators' arguments that DOJ's interpretation of the VRA compelled their race-based redistricting plans.

J.S. App. A-54.

Unlike *Miller v. Johnson*, 115 S. Ct. at 2492-94, the legislature in this case has never made the argument that it passed the redistricting plan because of pressure from the Department of Justice to maximize minority districts. The legislature has consistently maintained that its motivation for passing the instant redistricting plan arose solely out of incumbency protection concerns resulting from being caught between the Scylla of the anti-incumbency Lacey Plan and the Charybdis of the flawed but more incumbent-friendly *Reid* court plan. Lacey and *Reid* were the legislature's only two choices and the legislature chose *Reid*, albeit "reluctantly" to protect incumbents in spite of its racial flaws and not because of them. Mere awareness by a legislature of unconstitutional effects resulting from a legislative act does not supply the requisite unconstitutional motivation for invalidating the act. *See Miller*, 115 S. Ct. 2475; *Feeney*, 442 U.S. 256.

Finally, the district court purportedly finds racially based legislative motivation from

> statements by legislators during the Senate and Assembly debates regarding the adoption of the plan . . . and statements by legislators during hearings before the special master.

J.S. App. A-47-48.

In New York State, statements of individual legislators have no probative value in ascertaining legislative motivation. It is an accepted tenet of political reality in New York -- and the internal rules of the legislature reflect -- that all substantive legislative decisions, especially ones as politically sensitive as the redistricting of New York's congressional districts, are made solely by two people, the Majority Leader of the State Senate[7] and the Speaker of the State Assembly.

The legislature submitted testimony in respect of the motivations of these two individuals who in real life made the redistricting decision. J.S. App. A-86-89. The district court ignored the foregoing testimony entirely. Instead, it focused on selective out of context statements of certain individual legislators (not the leaders).

For example, the district court points to a so-called "acknowledgment" by one Senator Gold that the legislature specifically "adopt[ed] the [referees'] plan's methodology." J.S. App. A-51, n.16. However, nowhere in the quoted portion of Senator Gold's statement does such an alleged acknowledgment of "methodology" appear. In fact, neither the quote itself nor the district court's citation to Senator Gold's comments contains a reference to race. To the contrary, the district court's citation makes clear that Senator Gold was "discussing", not race, but rather the philosophy of "incumbency protection." *Id.* Further, Senator Gold was a senator from the party in the minority in the State Senate, and was a vocal opponent of and voted against the congressional redistricting legislation. It is hard to discern how one can ascribe legislative motivation based on the out-of-context statements of a single legislator *opposed* to the bill.

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[7] In fact, a well-known citizen's watchdog group, "The New York Public Interest Research Group" ("NYPIRG") publicly accused the New York State Senate Majority Leader of having "the most undemocratic legislative rule in the nation." News Release from the NYPIRG, *National Survey of States' Legislative Rules Released* (Jan. 7, 1997).

Similarly, the district court *cites* a statement by Senator Skelos as explaining the 12th Congressional District's shape (J.S. App. A-31), which the transcript in context shows to relate to another district entirely and which had "nothing to do with a minority district" and everything to do with protecting the seat of a white incumbent.

By contrast to these inapposite recitals, the incumbency protection motivation of the legislature is confirmed by the statements of numerous individual legislators during the Senate and Assembly debates, which the district court had before it, but chose to disregard. Indeed, Latino legislators railed against the plan as elevating incumbency over Latino rights. *See, e.g.*, Assemblyman Lopez ("'we have to weigh the poor incumbents to the needs of the Latino community.' Again we lose . . ." J.S. App. at A-26); Assemblyman Del Toro ("I don't believe that this legislature should be a party to anything that smacks of racial and ethnic gerrymandering. . . . I don't believe that we should necessarily draw these districts to protect incumbents whatever they may be." J.S. App. A-27).

Thus, the *enactment* of the legislative plan was driven by the legislature's understanding and fear that its failure to pass the Referees' Plan would result in the devastation of incumbents under the Lacey Plan. As Assemblyman Gantt explained in his opening remarks, which the district court acknowledges and quotes early in its opinion, "we are stuck with a situation that this [*Reid* court plan] is the only game in town, and we must do that." J.S. App. A-24.

II. THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT DID NOT CONSTITUTE THE "SENSITIVE AND DELICATE INQUIRY" COMMANDED BY *MILLER* AND *BUSH*.

The determination of a legislature's motivation in connection with an Equal Protection challenge "*demands a sensitive inquiry* into such circumstantial and direct evidence of intent as may be available." *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. at 266 (emphasis added).

In the districting context, particularly because of the fundamental role played by the States, the court's "sensitive inquiry" into a legislature's motivation is all the more circumscribed. As this Court stated in *Shaw II*:

> Applying traditional equal protection principles in the voting-rights context is "a most delicate task. . . ."

116 S. Ct. at 1900. In *Miller*, this Court cautioned:

> Federal Court review of districting legislation represents a serious intrusion into the most vital of local functions. It is well settled that "reapportionment is primarily the duty and responsibility of the State."
>
> * * *
>
> The courts, in assessing the sufficiency of a challenge to a districting plan, *must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus.* Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the districting process. *Shaw*, *supra*, at ___, 113 S.Ct., at 2826; see *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979) ("'[D]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects") (footnotes and citation omitted). *The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise*

> *extraordinary caution* in adjudicating claims that a state has drawn district lines on the basis of race.

115 S. Ct. at 2488 (emphasis added).

The district court's grant of summary judgment[8] declaring the 12th Congressional District unconstitutional is the only reported post *Shaw I* case in which congressional lines were declared unconstitutional without a hearing or trial. In the circumstances, the failure to grant the legislature even a rudimentary hearing, let alone a trial, hardly constitutes the appropriate sensitive and delicate inquiry commanded by this Court's precedents.

Indeed, in a variety of situations involving subjective intent or motivation, this Court has cautioned that summary judgment is generally inappropriate. *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982)(unlawful discharge of Federal employee)("[t]hese variables explain in part why questions of subjective intent so rarely can be decided by summary judgment"); *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979) (defamation)("[t]he proof of 'actual malice' calls a defendant's state of mind into question, and does not readily lend itself to summary disposition" [citations omitted]); *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 500 (1969)(antitrust)("'[w]e believe that summary procedures should be used sparingly . . . where motive and intent play leading roles . . .'"); *White Motor Co. v. U.S.*, 372 U.S. 253, 259 (1963)(antitrust)("[s]ummary judgments . . . are not appropriate 'where motive and intent play leading roles'" [citation omitted]).

The district court concedes that like *Bush*, the instant case is a "mixed motive case." The district court stated:

> "*Bush v. Vera*, ___ U.S. ___, 116 S. Ct. 1941 (1996), provides facts most similar to the present

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[8] The district court did not even permit oral argument on the summary judgment motion.

> case. Like the situation before this court, it was a 'mixed motive case'. . . ."

J.S. App. A-54.

Bush, however, emphasizes that in a "mixed motive" case "*[a] careful review* is, therefore, necessary to determine whether these districts are subject to strict scrutiny." 116 S. Ct. at 1952 (emphasis added). In fact, much of the disagreement between Justice O'Connor's plurality opinion and Justice Stevens' dissenting opinion turns not on legal issues, but on a disagreement between the two opinions with respect to the complex facts adduced after trial.

> In the application of our precedents to District 30, our disagreement with Justice STEVENS' dissent . . . is largely factual.
>
> * * *
>
> The dissenters misread us when they make the leap from *our disagreement about the facts of this case* to the conclusion that we are creating a "stalemate" by requiring the States to "get things just right,". . . .

Id. at 1957 n.*, 1960 (emphasis added).

Certainly then, at a minimum, in a mixed motive case appropriate divination of legislative motivation from a complex fact pattern makes the granting of summary judgment inappropriate for the sensitive and delicate inquiry demanded by this Court in redistricting cases. *Miller* speaks directly to this issue. It cautions district courts against the use of summary judgment in redistricting cases as follows:

> *Of course courts must also recognize these principles and the intrusive potential of judicial intervention into the legislative realm, when assessing under the Federal Rules of Civil Procedure the adequacy of a plaintiff's showing at the various stages of litigation and determining whether to permit discovery or trial to proceed.* See, *e.g., Fed. Rules Civ. Proc.*

12(b) & (e), 26(b)(2), 56; see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986).

Miller, 115 S. Ct. at 2488 (emphasis added).

In determining a legislature's motivation, this Court in *Arlington Heights*, indicated that a court should consider, *inter alia*, "historical background[,] . . . [t]he specific sequence of events leading up [to] the challenged decision, [and] . . . [t]he legislative or administrative history. . . ." 429 U.S. at 267-68.

Had the legislature been permitted a trial, it would have been able to demonstrate by way of just such a historical background the specific sequence of events leading up to the precise critical role the Senate Majority Leader and the Assembly Speaker played in the legislative process in New York (J.S. App. A-86-89) and why the testimony detailing the legislative conundrum with respect to the Lacey and *Reid* plans, which the district court ignored, would have demonstrated that plaintiffs failed to sustain their burden of showing that the legislature, in enacting the districting plan, was motivated primarily by racial considerations.

This Court's admonition in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), that before granting summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [its] favor", has not been heeded by the district court here. It resolved conflicting material issues of fact (*i.e.*, Senator Marino's testimony versus that of Senator Gold) in respect of legislative motivation without benefit of trial and the attendant cross-examination. The district court erroneously undertook issue resolution not an issue finding inquiry.

By rushing[9] pell mell to summary judgment and not even giving the legislature a chance at a hearing or trial, the district

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[9] There was no practical reason for the district court to rush. The district court denied plaintiffs' motion for injunctive relief which sought to enjoin the 1996 New York Congressional elections. Accordingly, this case easily

(Footnote continued)

court hardly showed the appropriate deference to the legislature that this court has unremittingly required in redistricting cases. *See Miller*, 115 S. Ct. at 2488; *Growe v. Emison*, 507 U.S. 25, 33-34 (1993); *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993); *Chapman v. Meier*, 420 U.S. 1, 27 (1975).

III. THE DISTRICT COURT ERRED IN NOT ACCORDING FULL FAITH AND CREDIT TO THE *REID* COURT'S JUDGMENT HOLDING CONSTITUTIONAL THE NEW YORK STATE CONGRESSIONAL REDISTRICTING PLAN.

This Court has held that:

> [28 USC] Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged.

Kremer v. Chemical Constr. Corp., 456 U.S. 461, 466, *reh'g denied*, 458 U.S. 1133 (1982)(footnote omitted).

New York "has adopted the transactional analysis approach in deciding *res judicata* issues. Under this analysis, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357, 445 N.Y.S.2d 687, 688 (1981)(citations omitted; emphasis in original). *See also Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500, 478 N.Y.S.2d 823, 826 (1984); *Schwartz v. Public Adm'r. of Bronx*, 24 N.Y.2d 65, 298 N.Y.S.2d 955 (1969); *Schuykill Fuel Corp. v. B & C Nieberg Realty Corp.*, 250 N.Y. 304, 306-07 (1929).

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can still go to trial in 1997 on a full record thereby assuring a complete resolution of the constitutional issues prior to the 1998 Congressional elections without unnecessarily truncating the process.

The very question of whether the 1992 Congressional redistricting plan meets the constitutional requirements of the Fourteenth and Fifteenth Amendments was addressed by the parties and intervenors and judicially determined in the State court *Reid* action. *Parties representative of, and in privity with,* the Hispanic-Latino and African-American plaintiffs herein were parties to the State Court *Reid* action.

A. There Is No Privity Impediment To *Res Judicata*

The district court in a footnote disposed of the legislature's *res judicata* argument by finding, *inter alia*, no privity between the parties in the two cases. J.S. App. A-40-41, n.13.

The legislature had premised its privity argument on the fact that de facto class action status obtained against members of the Latino class in *Reid*, so as to bind the Latino plaintiffs in this case from relitigating the issues raised by the Latino parties in the *Reid* case. Contrary to the district court's assertion, New York State has long recognized de facto class actions even absent formal class certification so as to bind others similarly situated even though not in privity in the ordinary sense.[10]

Here, all Hispanic-Latino and African-American voters share a common relationship to the same protections of the United States Constitution. The claim of unconstitutionality by Hispanic-Latino and African-American voters raised here belongs to the group comprising those voters. Hence, the litigation to judgment of that claim in the state court is "effective to preclude other actions predicated on the same wrong

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[10] Indeed, when the sovereign is a party to the action, as here, New York State law actually forbids formal class certification. *Rivera v. Trimarco*, 36 N.Y.2d 747, 368 N.Y.S.2d 826 (1975). *Accord Baumes v. Lavine*, 38 N.Y.2d 296, 305, 379 N.Y.S.2d 760, 767 (1975); *Jones v. Berman*, 37 N.Y.2d 42, 371 N.Y.S.2d 422 (1975); *see also Bronson v. Bd. of Educ.*, 525 F.2d 344 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976); *Bailey v. Patterson*, 323 F.2d 201 (5th Cir. 1963), *cert. denied sub nom. Jackson v. Bailey*, 376 U.S. 910 (1964).

brought by other . . ." Hispanic-Latinos and African-Americans. *Parkoff v. Gen. Tel. & Elecs. Corp.*, 53 N.Y.2d 412, 420, 442 N.Y.S.2d 432, 436 (1981). Like shareholders in the derivative action setting, Hispanic-Latino and African-American voters are "members of a represented class", *Green v. Santa Fe Indus., Inc.*, 70 N.Y.2d 244, 253, 519 N.Y.S.2d 793, 796 (1987), whose rights in common have been adjudicated, given the undisputable fact that the Fourteenth and Fifteenth Amendment rights of Hispanic-Latino and African-American voters were advocated, considered and adjudicated in the State court action.

Although required to do so by this Court's binding precedents, *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986); *Kremer*, 456 U.S. 461; *Allen v. McCurry*, 449 U.S. 90 (1980), the district court paid no attention to the aforesaid body of New York State decisional law.

B. No Change In Constitutional Law Occurred

The district court, citing *Miller*, 115 S. Ct. at 2492-94, also maintained that "res judicata may no longer apply" "where there exists a major change in constitutional law, as has occurred here" J.S. App. A-41, n.13. The district court is plainly wrong.

First, *Miller*, makes no claim that this court was announcing a major change in constitutional law. In fact, in *Shaw I*, upon which *Miller* builds, Justice O'Connor went to great lengths to explain that the Court's recognition that white voters could mount a Fourteenth Amendment challenge to a districting plan was based upon settled principles of law in redistricting cases under the Fourteenth and Fifteenth Amendments that date as far back as the 1960's.

Second, *Shaw I* cites with approval this Court's 1964 decision in *Wright v. Rockefeller*, 376 U.S. 52 (1964) and explicitly states that in *Wright*, "[e]very member of the Court assumed that the plaintiffs' allegations that the statute 'segregate[d] eligible voters by race and place of origin' stated a constitutional claim," but disagreed over whether the

plaintiffs had carried their burden of proving that the districts had been drawn with the intention of segregating voters based on race and place of national origin. *Shaw I*, 509 U.S. at 645 (citations omitted). The facts in *Wright* and the claims asserted therein are indistinguishable from those in *Shaw I* and from plaintiffs' claims here. Patently, then, *Miller* simply carried forward *Wright* precedent and effected no "major change in constitutional law."

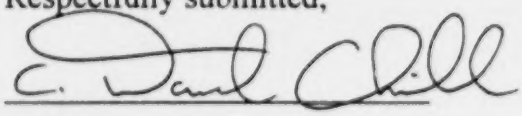
Third, as Justice O'Connor discusses, the holding in *Shaw I* (and by extension, *Miller*) is consonant with long-established Supreme Court Equal Protection jurisprudence requiring strict scrutiny of legislation distinguishing among citizens because of their race, even if the classification, although race-neutral, is "'unexplainable on grounds other than race.'" 509 U.S. at 643 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 [1977]).

In short, as *Shaw I* makes clear, the district court's announcement that *Shaw I* and its progeny, including *Miller*, made major changes in constitutional law is simply wrong.

CONCLUSION

For the foregoing reasons, Appellant Silver respectfully submits that the questions he presents are substantial and that this court docket this appeal for full briefing and argument. In the alternative, this court should accept jurisdiction of this appeal, reverse the final judgment of the district court which declared, *inter alia*, New York's 12th Congressional District unconstitutional, and remand to the district court with instructions to hold a full trial with respect to the legislature's motivation in enacting the congressional districting at issue in this case.

Respectfully submitted,



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April 17, 1997

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ANGEL DIAZ, *et al.*,

Appellees,

vs.

SHELDON SILVER, in his official capacity as Speaker of the House for the Assembly of the State of New York, *et al.*,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX

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Appendix A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

ANGEL DIAZ, DENISE L. MOTLEY, and REYNALDO COHOLO,

Plaintiffs,

– against –

SHELDON SILVER, in his official capacity as Speaker of the House for the Assembly of the State of New York; JOSEPH L. BRUNO, in his official capacity as President Pro Tem and Majority Leader of the Senate of the State of New York; GEORGE E. PATAKI, in his official capacity as Governor of the State of New York; THE BOARD OF ELECTIONS of THE STATE of NEW YORK; OWEN T. SMITH, EVELYN J. AQUILA, and HELENA M. DONOHUE, in their official capacities as commissioners of the Board of Elections of the State of New York; and JOHN DOES 1 THROUGH 50, the names of such defendants being fictitious and unknown to plaintiffs, and referring to those persons who are responsible in their official capacities for the enforcement of the legislation that created New York's federal congressional districts,

Defendants.

----------x

MEMORANDUM AND ORDER

Civil Action No. 95-CV-2591 (JMM, SJ, DGT)

Before: McLAUGHLIN, Circuit Judge, and JOHNSON, and TRAGER, District Judges,

PER CURIAM:

Plaintiffs, who are Latino and African-American, seek a declaratory judgment and a permanent injunction against the further use of the current configuration of New York State's 12th Congressional District on the ground that it violates their constitutional rights under the Fourteenth and Fifteenth Amendments to the United States Constitution. Before the court is their motion for summary judgment and defendant-intervenor Puerto Rican Legal Defense and Education Fund's cross-motion for summary judgment.

Background

(A) The Parties

Plaintiffs are residents and registered voters of the 12th Congressional District ("12th CD") of New York. *See* Second Amended Complaint ("Compl.") ¶¶ 1-4. Plaintiffs Diaz and Coholo are Puerto Rican.[1] *Id.* ¶ 56. Plaintiff Motley is African-American. *Id.* ¶ 60. Plaintiff Diaz ran for Congress in the 12th CD in the 1992 general election as a "Republican Conservative." Diaz Decl. ¶ 3.

Defendants, in their official capacities, are responsible for the enactment or enforcement of the legislation that created the congressional districts in New York. *See* Compl. ¶¶ 5-11. In addition, there are many intervenors in this suit. Delco Cornett is a pro se plaintiff-intervenor. Two Latino voters who live in the 12th CD, Margarita Lopez and Luis Garden Acosta, who are represented by the Puerto Rican Legal

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[1] Plaintiffs, as residents of the district, have standing to bring suit. *See United States v. Hays*, ---U.S. ---, 115 S.Ct. 2431, 2436 (1995) ("Where a plaintiff resides in a racially gerrymandered district, ... [that] plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action."). Moreover, notwithstanding that two of the plaintiffs are Latino (as are the majority of the district's residents), they have standing because they can suffer stigmatization and hostility by virtue of their race. *See Shaw v. Reno*, 509 U.S. 630, 643 (1993).

Defense and Education Fund ("PRLDEF"), have intervened on behalf of defendants. *See* PRLDEF Mem. Sup. Intervention at 1. Another group intervening on defendants' behalf consists of: Congressional Representative Nydia Velazquez, who represents the 12th CD; Major R. Owens, who represents an adjoining district which is majority African-American; and voters in the 10th, 11th, and 12th CDs. *See* Wooten Mem. Sup. Intervention at 4-7. They are being represented by Paul Wooten, Esq.. In addition, the Asian American Legal Defense and Education Fund ("AALDEF") is representing defendant-intervenors Peter Lau and John Kuo Wei Tchen, residents of the 12th CD. *See* AALDEF Mem Sup. Intervention at 1. Finally, Congresswoman Carolyn B. Maloney has also intervened, pro se, to have her interests considered, as she the representative of the 14th CD, a tri-county district that adjoins the 12th CD.

(B) The 1992 Redistricting Process

(1) An Overview of the Redistricting Process

Initial responsibility for congressional redistricting lies with the New York State Legislature. However, because Bronx, New York, and Kings Counties are "covered" jurisdictions under the Voting Rights Act, 79 Stat. 437, as amended, 42 U.S.C. § 1973 *et seq.* ("VRA"), any legislative alteration of voting procedures, including redistricting, required preclearance by the U.S. Department of Justice ("DOJ") before its implementation. *See* Compl. ¶ 23.

DOJ preclearance ensures that proposed redistricting complies with the provisions of the VRA, particularly § 2, which forbids the abridgement of voting rights "on account of race or color." 42 U.S.C. § 1973 (Supp.1994). Under the VRA, a redistricting plan that provides "less opportunity [to minorities] than other members of the electorate to participate in the political process and to elect representatives of their choice" abridges voting rights. *Id.*

DOJ had interpreted this provision to require that a redistricting proposal maximize the number of majority-minority

(i.e.non-Caucasian) districts. In 1995, the Supreme Court rejected the maximization interpretation of the VRA. *See Miller v. Johnson*, ---U.S. ---, 115 S.Ct. 2475, 2492-94 (1995) (rejecting DOJ's maximization policy as "a shortsighted and unauthorized view of the Voting Rights Act").

The 1990 U.S. census revealed that New York's population growth was slower than other states. Consequently, New York's congressional delegation had to be reduced from 34 to 31 members. *See* Compl. ¶ 15. In 1991, the New York State Legislature established a task force to create a new congressional districting plan. *See* Compl. ¶ 16. Both the Senate and Assembly were fully cognizant of the Department of Justice's modus operandi with regard to preclearance and VRA § 2. New York had previously encountered DOJ objections to the proposed redistricting of the New York City Council in 1991, as well as to the proposed redistricting of the State Senate and Assembly in 1992. *See* Ex. N of PRLDEF Opp. Prelim. Inj., Ltr. of U.S. Ass't Atty. Gen'l, dated June 22, 1982 (finding that New York State's 1982 Legislative plan discriminated against Latino voters); Ex. O of PRLDEF Opp. Prelim. Inj., Leg. History of 1982 VRA Amendments (finding that Latino voters were discriminated against in the redistricting of the New York City Council after the 1980 census); Ex. P of PRLDEF Opp. Prelim. Inj., DOJ Ltr. dated July 19, 1991 at 2 (explaining that Latinos were "unfairly underrepresented on the council. In one area, the proposed configuration of district boundary lines appears to have been drawn in such a way as to minimize Hispanic voting strength"); Ex. Q of PRLDEF Opp. Prelim. Inj., DOJ Ltr. dated June 24, 1992 at 2-3 (objecting to the proposed Assembly redistricting plan and noting that "[a]lthough incumbency protection is not in and of itself an inappropriate consideration, it may not be accomplished at the expense of minority voting potential").

By March of 1992 partisan politics had deadlocked the task force.[2] *See* Compl. ¶ 17; Aff. of C. Daniel Chill, Esq., counsel

[2] According to Senator Skelos, the plan that was eventually passed by the Legislature "represents about 90 percent of the agreement which was

(Footnote continued)

for defendant Silver ("Chill Aff.") ¶ 4. Because New York law mandated that the candidate-petitioning process commence on June 9, 1992, a state court action, *Reid v. Marino*, No. 9567-92 (N.Y. Sup.Ct. Kings Cty.1992), was filed on March 26, 1992 "to compel the development of a satisfactory redistricting plan." Compl. ¶¶ 17-18; *see* New York Election Law §§ 6-158(1), 6-134(b), 8-100. On March 31, 1992, a similar action was filed in federal court in the Eastern District of New York, *PRLDEF v. Gantt*, No. 92-CV-1521 (E.D.N.Y.1992). *See* Chill Aff. ¶ 11. This suit alleged "that New York's then existing congressional map denied Latino voters their right to vote in violation of the Voting Rights Act of 1965, as amended, and the Fourteenth and Fifteenth Amendments to the United States Constitution and 42 U.S.C. § 1983." Affirmation of Arthur A. Baer, Esq., counsel for PRLDEF, ("Baer Affirm.") ¶ 10.

The Eastern District three-judge panel appointed Hon. Frederick B. Lacey ("Lacey"), a retired United States District Judge, as special master and ordered him to develop a redistricting plan that would comply with federal law. *See PRLDEF v. Gantt*, 796 F.Supp. 681, 684 (E.D.N.Y.1992). Lacey filed his plan with the court on May 26, 1992. *See id.* The three-judge court adopted this plan in its entirety on June 26, 1992. *See id.* at 698.

At about the same time, in *Reid v. Marino*, the state court appointed a panel of three referees to develop a plan that would comply with federal and state law. The state court adopted the referees' plan on June 8, 1992. *See* Compl. ¶ 21.

The special master's plan differed from the referees' plan in the number of majority-Hispanic and African-American districts created. With a statewide Latino population of

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reached between the two houses of the Legislature." Ex. R of Aff. of C. Daniel Chill, Esq., counsel for defendant Silver, in Support of Silver Opp. Sum. Judg. ("Silver Opp. Sum. Judg."), Senate Tr. at 36. The record is unclear as to exactly what comprised the ninety percent that was incorporated into the plan and ultimately became law.

12.31%, the special master's plan provided for three majority-Latino districts out of thirty-one districts in New York (9.68%), while the referees' plan proposed two such districts (6.45%). With a statewide African-American population of 15.9%, the special master's plan created four majority-African-American districts (12.90%), while the referees' plan provided five majority-African-American districts (16.12%).

The New York State Legislature then had to decide whether to enact a bill that incorporated the referees' redistricting plan. In the event that the Legislature failed to do so, the federal special master's plan would take effect. The New York State Legislature enacted the bill incorporating the referees' plan and the Governor signed it soon thereafter. *See* Compl. ¶ 22. On July 2, 1992, the U.S. Department of Justice precleared the plan, and it became law. *See id.* ¶ 25.

(2) The Latino Population in New York City

According to the 1990 census figures, "[t]here are nearly two million Latinos in New York City, comprising 24.36% of New York City's population." Baer Affirm. ¶¶ 2, 25. In addition, Latinos represent 23.07% of New York City's voting age population ("VAP"). *See id.* ¶ 26. Statewide, Latinos represent 12.31% of the total population and 11.20% of New York State's voting age population. *See id.* ¶ 27.

According to PRLDEF, Latino citizens of New York City "bear the effects of historic discrimination in the areas of voting, employment, education, and housing, suffer depressed socio-economic conditions, and have traditionally low voter registration and turn out." *Id.* ¶ 41; *see also* Ex. R of PRLDEF Opp. Prelim. Inj., Order in *Ortiz, et al. v. New York State Bd. of Elections, et. al.*, No. 74-CV-455 (W.D.N.Y. July 10, 1975) (holding that New York's English-only election violated Latino voters' voting rights and ordering remedial relief); Ex. U of PRLDEF Opp. Prelim. Inj., "A Call to Action III"; Ex. V of PRLDEF Opp. Prelim. Inj., "Poverty in New York City, 1991: A Research Bulletin"; Ex. W of PRLDEF Opp. Prelim. Inj., "OREA Report" (discussing high school dropout rates);

PRLDEF Mem. Opp. Prelim. Inj. at 54-67 (documenting the history of social and economic discrimination of Latinos).

PRLDEF argues that discrimination has impacted Latino participation in politics. As of 1990, Latinos constituted only 1 of 13 (7.7%) of New York City's congressional delegation, 2 of 25(8%) of New York City's State Senate delegation, 4 of 60 (6.7%) of New York City's Assembly delegation, and 3 of 35 (8.6%) of New York City's Council members. *See* Baer Affirm. ¶ 51; Ex. S of PRLDEF Opp. Prelim. Inj., Compendium of Latino Elected Officials in New York City. PRLDEF claims that "Latino electoral candidates in New York City have been historically negatively impacted by polarized bloc voting." Baer Affirm. ¶ 33. Latino voter participation in elections in New York is depressed. *See* Baer Affirm. ¶ 56. Theodore S. Arrington, a Professor of Political Science at the University of North Carolina, has stated:

> [T]he social and economic position of African-American citizens and language minorities in New York, particularly those in New York City and surrounding counties, disadvantages them politically. They have had inferior opportunities to participate in the political process as a whole and to elect candidates of their choice. It also appears that compared to other citizens they have lower rates of voter registration and voter turnout, and are less likely to run for office or otherwise participate actively in the political process. When the effects of racially polarized voting are added to these factors, African-Americans, Hispanics, and Asians are confronted with an enormous barrier to equal participation and ability to elect candidates of their choice.

Ex. K of PRLDEF Opp. Prelim. Inj., Arrington Aff. ¶ 26.[3]

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[3] Professor Arrington, who assisted special master Lacey in his redistricting efforts pursuant to *PRLDEF v. Gantt*, No. 92-CV-1521 (E.D.N.Y.), made these statements in an affidavit submitted to the court in that action.

The extent of Latino political cohesion is unclear. Professor Arrington noted the inherent difficulty of combining the many ethnicities that make up the Latino community:

> Puerto Ricans may have very different concerns and interests than Hispanics from Central or South American countries. There may be disputes and inter-ethnic conflict between these groups. This would suggest that community of interest principles should lead to the formation, if possible, of a Puerto Rican district distinct from a district dominated by Dominicans, Colombians, and other Central and South Americans.

Id. ¶ 36. Professor Arrington further stated that the Latino community lacks cohesion.

> The Hispanic population is diverse ethnically and racially, and it sometimes lacks the degree of cohesion that is present in the African-American population. Therefore, it is wise to keep the percentage of Hispanic voting age population in a district relatively high.

Id. ¶ 32.

However, PRLDEF argues that the "Latino community in New York City is ... politically cohesive." Baer Affirm. ¶ 38. Allan J. Lichtman, Professor of History at The American University, who was retained by defendant-intervenors PRLDEF in the federal action *PRLDEF v. Gantt*, No. 92-CV-1521 (E.D.N.Y. 1992), also analyzed Latino voting patterns and found:

> The elections examined thus far show a pattern of polarized voting between Latinos and non-Latinos in elections with Latino and non-Latino candidates. The cohesion of Latino voters is extremely strong: almost invariably a substantial majority of Latino voters united behind Latino candidates. The pattern among non-Latino voters is more mixed given the multi-racial character of the non-Latino vote

> (blacks, Asians, and non-Hispanic whites). Still, a substantial majority of non-Latino voters typically lined up behind non-Latino candidates, especially in city council contests.

Ex. I of PRLDEF Opp. Prelim. Inj., Lichtman Decl. ¶ 7.

With respect to the 12th CD, Plaintiff Diaz claims that the district is "very diverse," including "Dominicans, Ecuadorians, Panamanians, Mexicans, Cubans, Colombians, and others," Diaz Decl. ¶ 5, and that "these groups tend to have different political concerns." *Id.* ¶ 12; *see also* ¶¶ 13-20. Further, plaintiff Diaz states: "In my experience the 12th CD did not contain a single community of interest. The people in Manhattan had obviously different local concerns than the people in Queens and Brooklyn. The voters did not seem to think the 12th CD was a community. Most were confused about whether they resided in the district or not." *Id.* ¶ 25-26.

(3) The Asian Population in New York City

The 1990 census reported that there were 512,719 Asian Americans living in New York City, of whom 228,085 "did not speak English very well." Affidavit of Michael Shen, President of the Board of Directors of AALDEF ("Shen Aff.") ¶ 21. According to the New York City Voter Assistance Commission, only twenty-six percent of eligible Asian-Americans were registered to vote in 1994. *See id.* ¶ 20.

Shen claims that "the lack of bilingual ballots and assistance has been a major impediment for Asian Americans seeking to participate in the political process." *Id.* ¶ 19. In addition, AALDEF asserts that its monitoring of a variety of polling sites from 1991 to 1993 revealed that Asian-American voters were "harass[ed] by poll workers, haphazard[ly] distribut[ed] bilingual materials" and given inaccurate translations of materials. *Id.* ¶ 25. In 1994, DOJ, pursuant to § 5 of

the VRA, required "machine ballots [to] be fully translated into Chinese, including the candidates' names." *Id.* 26.[4]

As with the Hispanic population, the degree of political cohesiveness within the Asian-American population is in question. AALDEF has conducted exit polls that "confirm that Asian Americans vote cohesively for Asian Americans when they are on the ballot." *Id.* ¶ 7. Somewhat contradictorily, however, AALDEF claims that although Asian-Americans have become an "influential minority in New York," *id.* ¶ 28, "[t]he arbitrary drawing of district lines ... has inhibited the Asian American community's ability to organize and develop a strong political cohesiveness." *Id.* ¶ 29.

AALDEF has also submitted an affidavit from Peter Lau, a defendant-intervenor and President of the Chinatown Voter Education Alliance, stating that he has reviewed official election results and has determined that Asian-American voters in Chinatown and Sunset Park are politically cohesive. *See* Lau Aff. ¶¶ 2, 45-51. Mr. Lau reports that in the November 1991 New York City Council general election in District 1, "76% of all Asian Americans voted for one of two Asian American candidates." *Id.* ¶ 48.[5] Mr. Lau suggests that "definitive elec-

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[4] AALDEF also produces affidavit evidence that Asian Americans in New York have faced discrimination in areas other than voting. *See* Lau Aff. ¶¶ 10-28 (discussing anti-Asian violence, police brutality and hate speech against Asian Americans that have occurred in New York); Tchen Aff. ¶¶ 39-44 (describing a variety of hate crimes and discrimination occurring in New York); Shen Aff. ¶¶ 34-40 (recounting New York elected officials' and candidates' derogatory remarks about Asian candidates).

[5] Mr. Lau cites additional statistics that indicate racial bloc voting by whites, but do not appear to support his claim of Asian-American political cohesion. For example, in the September 1991 Democratic New York City Council Primary in District 1, 47% of Asian-American voters supported the Asian-American candidate who lost, while 51% of white voters supported the winner of the primary. *See* Lau Aff. ¶ 47. In District 1's September 1993 primary election, one Asian-American candidate ran against two white candidates. Forty-seven percent of Asian-American voters supported the Asian candidate. Approximately 65% of white voters supported one white candidate and 19% of white voters supported the

(Footnote continued)

tion analysis would require accumulating additional data, in part because so few Asian Americans have run for elective office, and in part because of their low registration and voter turnout." *Id.* ¶ 50.

Mr. Lau also asserts that Chinatown and Sunset Park "are locked together as one community." *Id.* ¶ 52. "Many cultural ties link the two neighborhoods together." *Id.* ¶ 54. According to Mr. Lau:

> Sunset Park is the progeny of Chinatown. According to the 1990 census, although Sunset Park is relatively small, it is a growing community. The Asian-American population in Sunset Park has grown almost 200% since the 1980 Census. Historically, pragmatically, and culturally these two neighborhoods are interdependent. Asian Americans in Sunset Park and Chinatown form a single cohesive community....

Id. ¶ 55. John Kuo Wei Tchen, now Director of the Asian American Studies Program and Institute at New York University, agrees. He submits that "[l]abor force, limited English proficiency and shared community resources all tie these two neighborhoods together into one community." Tchen Aff. ¶ 18. Many residents of Sunset Park work and shop in Chinatown. *See id.* ¶¶ 20-22, And, "many service industries and community organizations ... minister to both neighborhoods," including Chinese daily newspapers, medical services and community agencies. *Id.* ¶¶ 25-30. Moreover, residents from both communities came from Hong Kong and Southern China and speak the Cantonese dialect of the Chinese language. *See id.* ¶ 24.

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other. *See id.* ¶ 49. In both of these instances, it seems that a majority of Asian-American voters supported Caucasian candidates.

(4) The Referees' Plan

According to plaintiffs:

> The Referees' Report is the single most important document that explains that district plan. Made contemporaneously with the district plan by the very individuals who were charged with drawing it, the Referees' Report clearly sets out the findings upon which the drafters relied, the interpretation of the Voting Rights Act that guided their thinking, and the methodology they used to configure New York's congressional districts.

Pltff Mem. for Prelim. Inj. at 12 (footnote omitted).

In addition to the referees' report and plan, plaintiffs rely upon the court hearings in *Reid v. Marino*. During these hearings, Professor Alan Gartner, whom the referees retained to draw the districts, "discussed the Referees' Plan in almost exclusively racial terms." Compl. ¶ 36. At the time, Dr. Gartner was Director of Research for the Graduate School and University Center of the City University of New York.

(a) Racial Criteria in the Creation and Methodology of the Referees' Plan

According to the referees' report, their redistricting plan incorporated the following criteria: "The one person, one vote standard of the United States Constitution; The Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, *et seq.*; Public interest criteria including contiguity, compactness, traditional boundaries in the State, communities of interest, and political fairness." Ex. C of PRLDEF Opp. Prelim. Inj., Referees' Report at 15. The referees determined that "[f]ederal law mandates that congressional redistricting plans must meet two primary requirements: the one person, one vote standard and the racial fairness standard." *Id.* at 17. They defined "racial fairness" as compliance with §§ 2 and 5 of the Voting Rights Act of 1965. *Id.* at 19-21.

The referees explicitly state in their report that they utilized racial data in a computer program to generate the new districts:

> Based upon the Board of Elections registration list, using surname dictionaries to identify Hispanic and non-Hispanic Asians, and then census-based estimates to identify non-Hispanic blacks and whites, an estimate of registration by race for New York City was developed. This was loaded on the REAPS system. Using REAPS, the referees not only were able to see how various minority districts (and the various racial and language groups within the same district) compared at the total population and voting age population levels, but also at the estimated registered voter level. In this manner, the Referees could "compensate" those districts in which large numbers of protected minorities with low citizenship rates resided, such as ... Hispanics in Northern Manhattan and Central Queens.

Id. at 33 n. 32. The referees first relied on the voting-age population ("VAP") to gauge minority voting strength and then refined this analysis using the estimated voter registration by race data and surname analysis to measure voting strength more precisely. *See id.* at 33.

During the court hearings in *Reid v. Marino*, Dr. Gartner described his use of the computer software:

> [O]ne of the things that the computer can do is it can produce maps which translate the Census numbers into geography, showing you, for example, concentrations of particular population groups. And so, we produced a set of maps that show the concentrations of the three so-called "protected classes" in New York City; in Census language: "Non-Hispanic blacks, non-Hispanic Asians," and "Hispanics."

> In effect, those concentrations tell you how to do the districting, per the Voting Rights Act. And, the order in which I will describe these districts, in effect, reflects our using those concentrations as the basis.

Ex. 7 of Chill Aff. in Support of Silver Mot. to Dismiss ("Silver Mot. to Dismiss"), June 2 Tr. at 111.

On June 5, 1992, Dr. Gartner testified that the computer was programmed to permit easy identification of racial concentrations: "[t]he richer the shade (indicating) ... the more intensive the [racial] population group." Ex. 9 of Silver Mot. to Dismiss, June 5 Tr. at 236. He also described the method in which the districts were drawn:

> [W]e were concerned with the percent of non-Hispanic whites in a district.
>
> We were concerned ... to keep that percentage down so we do not, in effect, violate the opportunity of a so-called "protected class." Or a group of protected classes in a district to have their rights violated by another group, who may tilt or switch the election.

Id. 233-34.

Professor Bernard Grofman, an expert who aided the referees, developed a four-step plan to ensure compliance with the VRA. One step entailed grouping "clusters of minority concentration" to maximize the number of districts having both the required population size to meet the "one person, one vote" standard and "effective minority voting equality." Ex. C of PRLDEF Opp. Prelim. Inj., Referees' Report at 23-24 n. 19. Such a scheme maximized the number of new majority-minority districts. The referees themselves specifically asserted that "where the minority populations were large and compact enough, the maximum number of districts which achieve 'effective minority voting equality' have been created." *Id.* at 3.

With regard to the factor of compactness, however, the referees acknowledged:

> [O]ur Plan includes a newly created tri-county Hispanic district [the 12th CD] which, although not "aesthetically" compact, was drawn in a manner to ensure an effective concentration of Hispanic voters that can elect the candidate of their choice.

Id. at 26. Moreover, Professor Gartner, discussing the 12th CD in particular, noted that "looking at the concentration maps, ... if you're not bound by *antiquated notions of compactness* ... an additional Hispanic seat ... the so-called 'Tri-County Seat'" may be developed. Ex. 7 of Silver Mot. to Dismiss, June 2 Tr. at 123 (emphasis added). A few days later he testified: "I believe it [the 12th CD] is the best Hispanic district you could draw, as well as also the best Asian district you can draw.... [However,] it is aesthetically unpleasing."[6] Ex. 9 of Silver Mot. to Dismiss, June 5 Tr. at 243.

Finally, when the referees compared their plan to those submitted to them, they briefly discussed the population equality standard and then carefully described the plans' racial characteristics. *See* Ex. C of PRLDEF Opp. Prelim. Inj., Referees' Report at 40-51. In their final report, the referees provided a compendium of the racial composition of the minority districts. *See id.* at 34-40. For each district, the only characteristic analyzed was voters' race. *See id.*; *see also* Ex. 5 of Declaration of Robert D. Popper, Esq., counsel for Plaintiffs ("Popper Decl."), chart entitled: "Congress Plan State Racial Breakdown."

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[6] Interestingly, the referees and their experts appear never to have considered the possibility of a more compact majority-Latino district in Manhattan. They discuss it only in the context of comparing the special master's plan to their own, only to reject the viability of such a district. *See* Ex. C of PRLDEF Opp. Prelim. Inj., Referees' Report at 54. The significance of this omission will become apparent when we discuss the factor of incumbency in the Discussion section (§ (D)(1)).

(b) Secondary Criteria in the Referees' Plan

As previously mentioned, the referees considered the "one person, one vote" standard and "racial fairness" primary to their redistricting efforts. *See* Ex. C of PRLDEF Opp. Prelim. Inj., Referees' Report at 17. Other factors are described as secondary criteria which "may" be considered:

> In addition to the two critical statutory and constitutional criteria, several other factors may be considered. These include contiguity, compactness, respect for traditional boundaries (such as county lines), communities of interest, and political fairness.

Id. at 24.

This summary, however, clearly does not tell the full story of all of the factors employed when developing the plan. For example, incumbency per se is never explicitly mentioned; it appears only as the veiled term "displace [ment]" of constituents. [7] *See id.* at 51-52. Despite its conspicuous absence from any direct discussion, incumbency appears to have been the unacknowledged third-most-significant factor used when redistricting. It is not contested that the 12th CD was the only district created by the referees in which an incumbent did not reside. Incumbents were "protected" in 87% of the new districts: twenty-seven districts were created with incumbents and three had two incumbents. *See* State Mem. Opp. Prelim. Inj. at 28; Ex. C of PRLDEF Opp. Prelim. Inj., Referees' Report at 29.

In addition, the lack of compactness of the new districts evidences that incumbency was the unspoken third criterion. Many of the congressional districts maintained the borders of prior districts and thus are not very compact. Two CDS

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[7] The goal of incumbency is to minimize the number of voters whose representative will change solely due to the redrawing of district lines. This "protects" incumbents because it preserves their base of political support in the district.

conjoin non-adjacent communities separated by both land and water. The 5th CD connects northeast Queens with northern Nassau and Suffolk counties, via the Long Island Sound.[8] *See* PRLDEF Mem. Opp. Sum. Judj. at 33. The 8th CD combines the Upper West Side, the West Village, Soho, Tribeca and Battery Park City of Manhattan with the southeastern parts of Brooklyn, including Brighton Beach and Coney Island, as well as Borough Park, in central Brooklyn. *See id.* at 34.

Moreover, the 9th CD contains significant portions of Brooklyn and Queens including: Park Slope, Canarsie, Rockaways, Sheepshead Bay, Forest Hills, Howard Beach, Woodhaven, Forest Hills and Kew Gardens. Pieces of the 10th, 11th, and 12th CD intersperse the 9th CD. *See id.*

The plan provides for two other tri-county districts in addition to the 12th CD. The 18th CD connects the Bronx, Queens and Westchester County beginning in southern Westchester into the East Bronx and then crossing the East River into central Queens. *See id.* at 35. And the 14th CD combines parts of Brooklyn, Manhattan and Queens, including parts of the Upper East and West Sides and the Lower East Side, as well as Greenpoint in Brooklyn and Astoria in Queens. *See id.* at 34-35.

Despite this disregard for compactness, the State Supreme Court found that the referees' proposed plan was "complete and valid under the constitutions of the United States and the State of New York as well as the Federal Voting Rights Act." Ex. X of PRLDEF Opp. Prelim. Inj., Order and Judgment in *Reid v. Marino*, No. 9567-92 (N.Y. Sup.Ct. Kings Cty. 1992) at 3. According to the state court, the referees' plan was also "the only one presently before any court that fully comports

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[8] This district has been described as non-contiguous: "At several points the district is connected across open water, and anyone wishing to traverse its boundaries from one end of it to the other better be a good swimmer." Michael Barone et al., *The Almanac of American Politics 1996* 918 (1995).

with these requirements and other applicable criteria as set forth in the referees' report." *Id.* at 4.

(5) The Special Master's Plan

Like the referees, the special master considered the population equality and VRA mandates most crucial when creating his plan for the federal court. However, "[a]fter complying with constitutional and Voting Rights Act requirements, a redistricting plan may properly consider a 'wide array of secondary or equitable criteria.' " Ex. B of PRLDEF Opp. Prelim. Inj., Special Master's Report at 29 (citation omitted). For these criteria, the special master relied upon *Good v. Austin*, 800 F.Supp. 551, 554 (E. & W.D. Mich. 1992), which states: "Federal courts have recognized the following as relevant secondary criteria: compactness, contiguity, preservation of the integrity of county and municipal boundaries, maintenance of the cores of existing districts, preservation of cultural, social, and economic communities of interests, and political and racial fairness."

As did the referees, the special master maintained that he was required not to disperse minorities into districts so that they would constitute an ineffective minority of voters; nor was he required to concentrate minorities into districts so that they would be an excessive majority. *See* Ex. B of PRLDEF Opp. Prelim. Inj., Special Master's Report at 19. Additionally, although the special master did not explicitly state that he attempted to maximize the number of majority-minority districts, it appears that he did, since he created the same number of such districts as the referees, who specifically proffered maximization as a goal. *See* Ex. C of PRLDEF Opp. Prelim. Inj., Referees' Report at 3, 51. Most significantly, the special master and the referees used the same race-sensitive computer program, REAPS, to design their respective plans. *See* Ex. B of PRLDEF Opp. Prelim. Inj., Special Master's Report at 5-6. This is strong evidence of majority-minority district maximization in the special master's plan as well.

The special master afforded least weight to the "public interest" factors. *See id.* at 29. These included the "community

of interest," which the special master defined as " 'distinctive units which share common concerns with respect to one or more identifiable features such as geography, demography, ethnicity, culture, socio-economic status or trade.' " *Id.* at 30 (quoting *Carstens v. Lamm*, 543 F.Supp. 68, 91 (D.Colo. 1982)). In addition, the special master took into account political fairness, described as drawing district lines "so as not to disproportionately advantage or disadvantage one political party or another." *Id.* at 31. Finally, he considered compactness and contiguity "[t]o the extent that these factors did not impair my ability to comply with constitutional and Voting Rights Act requirements...." *Id.* at 36. The special master explained that he created districts

> [t]hat are compact and contiguous where satisfaction of the provisions of the Voting Rights Act is not an issue. In New York City, where Voting Rights Act concerns dictated many of my districting decisions, the proposed districts are less compact but nonetheless compare favorably with the districts drawn for New York City by other plan proponents.

Id. at 37 (citation omitted).[9] Following the direction of the court, however, he did not consider protection of incumbents. *See id.* at 34.

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[9] It is not clear that either this claim by the special master or the claim by the state court that the referees' plan was superior to all competing plans was correct. For example, at a hearing held by the special master, Assemblyman John Faso submitted the Assembly Republican Conference Plan which allegedly created a more compact, although less populous majority-Latino district. Assemblyman Faso stated:

> [T]he Voting Rights Act requires us to create opportunities for minority voters. However it does not require us to also destroy communities of interest which minority voters have like white voters and every other voter in our state to have districts that are reasonably compact. As someone who represents an assembly district upstate, I can tell you that having a community fragmented and counties and jurisdictions fragmented makes it all the more difficult for one to represent that area....

(Footnote continued)

(6) The Referees' and the Special Master's Plans Compared

The referees' plan and the special master's plan differ in two essential ways: the number of majority-Latino districts created and the inclusion of incumbency as a factor in redistricting. Importantly, however, both plans do envision a tri-county majority-Latino district.

Both the special master's and the referees' plans created seven majority-minority districts. *See* Ex. C of PRLDEF Opp. Prelim. Inj., Referees' Report at 51. As previously noted, however, the referees' plan, effectively created two Latino districts and five African-American districts, *see id.* at 34, while the special master's plan created three Latino districts and four African-American districts. Ex. B of PRLDEF Opp. Prelim. Inj., Special Master's Report at 37. With regard to the special master's creation of the third majority-Latino district, the referees wrote:

> The Special Master draws a third Hispanic district in the Bronx and Manhattan; it is 59% Hispanic, and 40% Hispanic voter registration, including the Washington Heights Dominican community making this marginal Hispanic district less secure because of low citizenship rates. Our plan includes a Bronx/Westchester district, which is 36% African-American VAP [voter age population], 26% Hispanic VAP. and 3% Asian VAP, for a total minority VAP, of 67%.

Ex. C of PRLDEF Opp. Prelim. Inj., Referees' Report at 54.

The special master's plan described its creation of seven majority-minority districts:

> ... [V]ery strange and odd looking configurations on the map do not necessarily improve representation or government.

Ex. L of Silver Opp. Sum. Judg., Special Master Hrg. Tr. at 28-29. The record does not indicate what the flaw was in Assemblyman Faso's plan.

> The plan creates seven districts affording majority control to racial and language minorities. Four are African-American districts and three are Hispanic districts. Each of these control districts contains at least 55 percent or more voting age population ("VAP") for a protected minority. In the opinion of Professor Arrington, the Plan performs at least as well and usually better than other plans submitted to the Court in maximizing African-American and Hispanic voting power.

Ex. B of PRLDEF Opp. Prelim. Inj., Special Master's Report at 37 (citations omitted).

The second major point of comparison between the two plans is the inclusion of incumbency as a redistricting criterion. Incumbency was the third-most-significant factor in the referees' plan, whereas it played no role in the special master's. This allowed the special master to draw a Latino district in the Bronx and Manhattan that was far more compact and cohesive than that drawn by the referees.

The referees' report noted the disparity in the number of voters who would be displaced, i.e. whose representative would change, between their plan and the special master's:

> One of the most striking differences is that the Special Master's Plan splits six of the seven minority district [sic] between two or more counties. Our plan proposes four of its seven minority districts within a single county....
>
> The Master's Plan, as compared to our plan, vastly changes the geography and, therefore, the constituencies of the five present minority districts in New York City....
>
> ... On the average, the Master's Final Plan 'displaces' 58% of the constituents, while the Referees' Final Plan 'displaces' only 25%.

Ex. C of PRLDEF Opp. Prelim. Inj., Referees' Report at 51.

Additionally, the special master created a tri-county majority-Latino district that was very similar to the one drawn by the referees. The comparable referees' district had additional curves, but the foundation of both plans was the same. Most importantly, as previously mentioned, the state referees and the federal special master used the same race-based computer program to determine the shape of the districts.

(7) The New York State Legislature

(a) Legislative Input in the Creation of the State and Federal court Plans

The Senate and the Assembly submitted their own redistricting plans to both the special master and the referees. The referees noted: "[a]ll the proposed plans submitted to the Referees and to Special Master Lacey, include a similar tri-county Hispanic District." Ex. C of PRLDEF Opp. Prelim. Inj., Referees' Report at 26 n. 22.

Legislators also voiced their opinions regarding the redistricting process at a hearing held by the special master. At this hearing, representatives from the Assembly and from the Senate were afforded the opportunity both to present their respective plans and to comment on each other's plan. While the Assembly's spokesperson, Dr. Roman Hedges, made a passing reference to incumbency, *see* Ex. L of Chill Aff. in Support of Silver Opp. Sum. Judg. ("Silver Opp. Sum. Judg."), Special Master Hrg. Tr., he primarily discussed the creation of majority-minority districts. Comparing the Assembly's plan to the Senate's, he stated:

> [T]he big differences we think are in regards to treatment of the two Afro-American seats in Brooklyn where one of those two seats has a very substantial high turnout, white population that would significantly endanger the Afro-American seat currently held by Major Owens.
>
> We don't see incumbency protection as an issue but we are very much concerned with retrogression....

> ... [T]he rest of the differences between our plan and that proposed by the Senate are relatively small scale, and I would note a couple of things that seem to me to be in common with almost every plan, and that is there is the creation of a new Hispanic seat that goes from Brooklyn to Manhattan and to Queens which has a very consistent configuration of the Lower East Side, pieces of Jackson Heights and the Bushwick-East New York sections of Brooklyn.

Id. at 16-17.

The representative from the Senate, Mr. Michael Carvin, discussed the three majority-Latino districts it created, including its tri-county district. *See id.* at 88-92, 100-02. He explained: "What we do consistent with the Voting Rights Act is seek to group together concentrations of minority voters rather than split them apart, as is done certainly in the assembly plan and some of the others that have been presented." *Id.* at 89-90. Although the Senate and Assembly versions differed in the extent to which they prioritized the creation of an Asian-American influence district and, perhaps, incumbency, the primary purpose of both the Assembly and the Senate was to devise a second majority-Latino district. *See* Ex. Q of Silver Opp. Sum. Judg., Assembly Tr. at 4, 12-20; Ex. R of Silver Opp. Sum. Judg., Senate Tr. at 36, 71-72, 80-82. Carvin explained why the Senate, unlike the Assembly, had not aggregated Asian-American voters:

> That is not in any sense disenfranchising or splitting Asian voters as we have heard here. What it does is allow them to continue in the district that they have participated in for years.

Ex. L of Silver Opp. Sum. Judg., Special Master Hrg. Tr. at 107.

(b) Legislative Enactment of the Referees' Plan

(1) The State Assembly

When Assemblyman David F. Gantt introduced the referees' plan to the Assembly, he began by describing the criteria used in its creation:

> The plan according to the referees complies with the one person/one vote requirement of the United States Constitution, the Equal Rights Protection Clause of the Fourteenth Amendment, and the federal Voting Rights Act. *The maximum number of majority minority voting rights districts were created to ensure compliance with the Voting Rights Act.*
>
> ... This plan creates an additional district that will help to ensure the election of the minority community's candidate of its choice.

Ex. Q of Silver Opp. Sum. Judg., Assembly Tr. at 3 (emphasis added). This statement serves as the backdrop for all further Assembly discussion.

Assemblyman Gantt stated that it was not the plan that he or the Speaker of the Assembly would have created, but "we are stuck with a situation that this is the only game in town, and we must do that." *Id.* He noted the importance of the Legislature acting affirmatively: "I don't take pride of authorship [of the proposed plan], but the fact is I think the legislature should not abrogate its responsibility to pass a plan in the state." *Id.* at 31. It was understood that if the Legislature failed to adopt the referees' plan, then the special master's incumbent-unfriendly plan would take effect. *See, e.g., id.* at 12; Ex. R of Silver Opp. Sum. Judg., Senate Tr. at 93, 95.

The Assembly also noted that the federal special master's plan created three majority-Latino districts, while the state plan by the referees created only two. Assemblyman Roberto

Ramirez explicitly explained this principal difference between the two plans:

> It is interesting, political gerrymandering has been the traditional role of the state legislatures throughout this country. It is inconceivable that in 1992 the state court system of New York has now become a gerrymandering arm of the New York State Legislature.
>
> There is no question in my mind that the federal master's map enhances the Puerto Rican-Hispanic community's opportunity to elect three candidates of their choice. We should not accept anything less. That is why I will vote against this congressional districting bill.
>
> It has been said much more eloquently than I could ever say it, that it does not matter how you add it up, three is better than two. I know that in the business of politics, oftentimes, we manage to muddle the issue. This is a clear issue, three is better than two.

Ex. Q of Silver Opp. Sum. Judg., Assembly Tr. at 26-27. Assemblyman Vito Lopez similarly railed against the bill because it proposed only two majority-Latino districts. He remarks, in a part of his almost seven pages of transcript:

> I think there's three issues here: Equity, empowerment, and fairness.
>
> Equity and empowerment, I think you would have to ... vote no today.... It's almost mathematically impossible ... [t]here are almost 2 million people in New York City, and you need about 300,000 people per Congressional district to constitute a Latino-Puerto Rican Congressional seat. It almost has to be planned to be exclusive of the Latino community. And do you know something? I know people will do their voting today, but if this was your group, if this was the farmers or if this

> was the African-American community, if this was a Republican community, people would be outraged. The Latino community is going to be a victim.
>
> ....
>
> Well, boy, oh, boy, there's a barrier today. There's an institutional barrier that says we're not going to have three Latino members of Congress....
>
> Then the other issue that I made reference to is fairness. And this is where we always lose. What is fair? So, on one hand, people will say, "Well, look, ... we have to weigh the poor incumbents to the needs of the Latino community." Again, we lose....
>
> ....
>
> ... When you vote for this plan, you're voting against the Latino community.

Id. at 41-43.

Like Assemblymen Ramirez and Lopez, Assemblyman Angelo Del Toro argued that the referees' plan failed to maximize Latino representation in New York City:

> I think we should not be passing this bill today.... I think that one thing is clear, that even the state order that Mr. Gantt has referred to has to go before the federal Voting Rights Act, and I will guarantee you, that this is not the end of this discussion. It is clear, by the numbers, that a third Hispanic seat, two of them in northern Manhattan and the Bronx, and one in the Brooklyn-Triborough District, Queens and Manhattan were possible, and, that our community in New York City is totally mobilized to ensure that we get a fair reading.

Id. at 17-18.

Assemblyman Gantt had sought to preempt these criticisms, contending, as did the referees, that the plans creating

three majority-Latino districts were not viable. He stated: "[T]here is an opinion by some people that those districts, some of which were drawn in the federal plan, were not necessarily winnable for minorities." *Id.* at 16. Assemblyman Del Toro responded:

> [I]n a city where over 52 percent, and we know that that is an under-count of the minority population, is minority. We have to take every opportunity we can to fairly break up the number of minority Congressional seats to approximate what that percentage of the population should be.
>
> ....
>
> ....
>
> I don't believe that this legislature should be a party to anything that smacks of racial and ethnic gerrymandering.... I don't believe that we should necessarily draw these districts to protect incumbents whatever they may be.

Id. at 18-19.

Assemblyman Clarence Norman, Jr., however, explained why he supported the adoption of the referees' plan rather than the special master's plan.

> Hailing from Brooklyn, and contemplating the devastation on the possible retention of our Afro-American Congressman in Brooklyn, Major Owens, and their towns in particular, I realize that the only alternative we have is to support this plan. But, when I think of Congressman Owens' district as proposed under the federal plan, his minority population would drop from 92 percent to 56 percent, thereby placing him in jeopardy. As well, Congressman Towns' purported district would take him way into Queens, an area which has very little in common with his present political base. So, as such, these two Congressmen would be in severe

> jeopardy of being reelected, and even if they were reelected, the possibility of the African-American communities to be able to elect succeeding African-Americans to those seats would be highly unlikely.
>
> So, in looking at the two plans and juxtaposing the two, I am, indeed, compelled to support the plan that is before us.

Id. at 56. Assemblyman Albert Vann spoke similarly, recalling that "[o]ver the years, I have ... earned a reputation for being for the empowerment of people of color [and support the Latino cause], ... I'm saddened that we cannot be together on this.... But the federal plan may create three districts for the Hispanic community in this state, but it jeopardizes three of the four seats that are held in New York City by African-Americans." *Id.* at 47-49.

In addition to the extensive discussion of the division of minority districts between Latino and African-American voters, the Assembly also acknowledged that protection of incumbents explained the shape of some of the districts in the referees' plan. For example, Assemblywoman Deborah Glick stated: "There has been a clear attempt to gerrymander based on personalities, personalities and the intention to protect the incumbents." *Id.* at 23. Some members of the Assembly seemed particularly concerned about the manner in which the plan divided communities to protect incumbents. Assemblyman Sullivan lambasted the plan's division of communities:

> [T]here is another thing, a community, people move into a town presumably because they want to move and live together. They want to be part of a community, and they have a right to be represented as a community, unless they live in Manhattan, then they are all carved up like salami.
>
> We have a law in the state which says if you draw legislative lines, you must respect communities. Not

> in Manhattan, you can carve us up like we don't care, it does not matter to us.

Id. at 7-8.

(2) The State Senate

Although, as previously noted, incumbency as a redistricting criterion was not explicitly mentioned in the referees' report, its significance in the development of the referees' plan was openly acknowledged in the State Senate debate. Senator Dean G. Skelos, the proponent of the bill adopting the referees' plan in the New York State Senate, noted the state's congressional delegation's widespread support for it:

> The Federal Master's Plan was overwhelmingly rejected by the New York congressional delegation, as the plan would have deprived many communities of the working relationship they have built up with their representatives. The legislation before us has received strong support from the congressional delegation both Republicans and Democrats.
>
> ....
>
> ....
>
> The plan preserves the area of the current districts for the five minority districts with incumbents.
>
> The plan preserves the cores of existing districts.

Ex. R of Silver Opp. Sum. Judg., Senate Tr. at 36-37.

The emphasis given incumbency was, however, strongly criticized. State Senator Martin Connor objected to the weight given to incumbency at the expense of community in the referees' plan:

> We've now, to serve both the interests of incumbents, of constituency continuity--you know, part of preserving incumbents, if you read the cases, Mr. President, talks about preserving the continuity of

> constituencies. That was the nice way the courts used to talk about protecting incumbents, not by looking at the office holder but by saying to keep intact the basic confines of an existing district and maybe add onto it. While it resulted in the incumbent's election or re-election, it preserved the continuity of the constituency.
>
> ....
>
> ....
>
> Because as I look at this plan, I mean it's unfathomable to me that you can go from Westchester by a little one-block long thing into Queens and you can go from Sheepshead Bay all the way up the Westside of Manhattan. It may serve certain incumbents well, but it doesn't serve, I think, the people in the neighborhoods....
>
> ....
>
> ....
>
> ....
>
> I don't think [the plan is] fair. I don't think it does as good a job of giving representation to Hispanics as other proposals we saw earlier coming from legislative houses and there's proposals that have come from the Federal Master's Plan, and I think that's a very, very serious fault in this plan. I don't think we ought to adopt a plan whose architects obviously so protected incumbents that they denied Puerto Rican and Hispanic voters an opportunity for enhanced representation. So I intend to vote no.

Id. at 88-89, 90, 92.

State Senator Emanuel R. Gold also argued that the significance granted to incumbency in the plan was improper. He contended that one of the referees in the state case should

have disqualified himself from the case because he "has ties to the Brooklyn Democratic organization. There were chits to pay even to a Congressman partially from Queens...." *Id.* at 47. He continued:

> I spoke to people, and people say, well, you know there's eighteen Congress people involved, and sixteen of them like it. Sixteen what like it? Sixteen selfish political people just like we are that look at their own little lines and say, "My God, my back side got saved." To hell with the people.
>
> Under this plan, Queens County's two million people will be broken up and have seven congressional pieces.

Id. at 53-54.

Senator Skelos, however, sought to justify the shape of the 12th CD with the need to comply with the perceived requirements of the VRA:

> I think you should also point out that sometimes that's [extremely thin areas of districts] necessitated by the creation of minority districts in neighboring communities to satisfy the Voting Rights Act.

Id. at 42.

Jeremy S. Weinstein, a Senator from Queens, did not accept this explanation and objected to the shape of many districts, accusing the referees of unacceptably dividing communities.

> [I]t looks like for several miles, is set one block long, cutting right through ... Queens County ..., so that it then spreads out like a spread of wings to pick up other communities. Do you think that's an acceptable way?

Id. at 68. He continued with the sarcastic comment: "It was not done for the Voting Rights Act. For what purpose was it done?" *Id.* at 70. Demanding that the Senate enact its own

plan, he questioned Senator Skelos: "But it's [the proposed bill] not as good as what you could accomplish?" *Id.* at 71.

In responding to Senator Weinstein's comments and questions, Senator Skelos answered:

> [T]here was an agreement [between the Assembly and Senate in March 1992] that was 90 percent complete, and what I believe happened ... here is that the Court and the referees took into account by looking at the various plans of the two houses and then resolved what may have been the outstanding issues between the two houses.

Id. at 71.

Senator Franz Leichter also opposed the proposed bill and concluded his remarks by stating:

> I hope that the courts will look at this, will look at the fact that they have this plan that is so terribly political and without having come through the proper political process, and I hope the courts or the Justice Department as they look at it will not view this as the Legislature's plan, because it isn't.

Id. at 86.

Senator Olga A. Mendez agreed with Senator Gold and also couched the Senate's impending decision in racial terms, questioning whether it would adopt the referees' plan, which created one new Latino district, or yield to the adoption of the special master's plan, which created two. Senator Mendez contended that although the special master's plan would increase Hispanic representation, it was being overlooked because it threatened incumbents. *See id.* at 61-63. She stated:

> All right. We know that the demography has changed, and we know that the State of New York must eliminate three congressional districts. Must it be done at the expense, Mr. President, of the Puerto Rican and the Hispanic community?

Id. at 62-63. Several other senators similarly perceived the referees' plan to be unfair to Latino voters because it failed to maximize the number of majority-Latino districts. *See id.* at 75-82.

(c) Adoption of the Referees' Plan

Despite the protestations concerning the referees' plan's failings and unfairness, the Legislature passed the plan on June 10, 1992 and the Governor signed it almost immediately thereafter.

The Governor took care to mention that he would have preferred a plan that created three majority-Latino districts:

> [T]he Legislature has now chosen simply to adopt in legislation the plan created by the state court saying it is close to what they might have done ... In my judgment, the failure of the state court plan to create three Latino districts ... violates the provisions of the Voting Rights Act.

Ex. S of Silver Opp. Sum. Judg., Governor's Statement Explaining Bill Signing.

He explained, however, that he would not veto the legislation containing the referees' plan because the special master's plan "is even worse for representing our citizens, ignoring the cores of existing communities and applying a novel 55% majority standard for districts, which as it has been applied produces demonstrably weaker minority seats." *Id.*

(8) Department of Justice Pro-Clearance

Section 5 of the VRA requires "the chief legal officer or other appropriate official" of a state to submit to the U.S. Attorney General any change in voting procedures in a "covered jurisdiction." 42 U.S.C. § 1973 (Supp. 1994). Bronx, Kings and New York Counties were and are covered jurisdictions. Thus the proposed reapportionment scheme could become effective only if the U.S. Attorney General approved the plan. As required by § 5 of the VRA, the Legislature submitted the

redistricting legislation to DOJ for pre-clearance. *See* Ex. DD of Silver Opp. Sum. Judg., DOJ Submission; Ex. 4 of Popper Decl., DOJ Submission.

DOJ had adopted regulations implementing § 5 of the VRA. *See* 28 C.F.R. Chap. 1, Part 51. These regulations specify that "the chief legal officer or other appropriate official ... or by any other authorized person on behalf of the submitting authority" provide the necessary information to the Attorney General. 28 C.F.R. § 51.23(a). Section 51.27 describes the required information: paragraphs (a) and (b) require copies of the existing law and proposed changes; paragraph (c) requires the submitting party to explain the reasons for the change:

> (c) If the change affecting voting either is not readily apparent on the face of the documents provided under paragraphs (a) and (b) of this section or is not embodied in a document, [the submission must include] a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and proposed situation with respect to voting.

28 C.F.R; § 51.27(c). Based on the submission, DOJ would assess whether the changes violate § 5 or § 2 of the VRA.

Senator Dean G. Skelos, "[o]n behalf of the Senate," and Assemblyman David F. Gantt, "[o]n behalf of the Assembly," wrote to the Chief of the Voting Rights Section of DOJ, submitting the required information and requesting pre-clearance. In their submission, under the section "Analysis of Change to Previous Law (51.27)(c)," they emphasized the importance of the referees' report, stating: "The Report of the Referees to Justice Shaw explains in detail the background leading up to the development of this plan by the referees for the State Supreme Court.... This law, incorporating the state court plan, is being submitted for preclearance. The Report of the Referees follows." Ex. 4 of Popper Decl.,

DOJ Submission. Thus, the Referees' Report, attached as necessary supporting information, was sent to DOJ in order to explain the proposed changes in the districting plan. Indeed, the referees' report was the only explanation offered to describe the revisions.

DOJ responded to the Legislature's submission on July 2, 1992. *See* Ex. G of PRLDEF Opp. Prelim. Inj. In granting approval, the Acting U.S. Assistant Attorney General stated:

> The Attorney General does not interpose any objection to the congressional redistricting plan. Our review persuades us that, as required by Section 5, the state has demonstrated that this redistricting legislation was neither designed to discriminate against minority voters nor does it have a retrogressive effect on their voting rights.

Id.

(9) Latino Disapproval of the Referees' Plan

Latino members of the New York Legislature had unanimously voted against the legislation. *See* Ex. D of Graber Decl. Opp. Prelim. Inj. In addition, the Puerto Rican/Hispanic Task Force of the New York State Assembly urged the Governor to veto the Legislature's plan, claiming that it diminished Latino voting rights. *See* Ex. C of Graber Decl. Opp. Prelim. Inj. The Latino members of the New York Legislature instead advocated passage of the special master's plan created in the federal court. *See id.*

Once the plan was signed by the Governor and approved by DOJ, Latino legal advocates tried in two separate actions to block its implementation before the November 1992 elections. They argued that the plan violated § 2 of the VRA, maintaining that if an additional compact and cohesive majority-Latino district could be created, as it was in the special master's plan, then the state plan's failure to include this third Latino district must necessarily dilute Latino voting strength. *See Torres v. Cuomo*, No. 92-CV-5811, 1993 WL 33639 (S.D.N.Y., Feb. 3, 1993); *PRLDEF v. Gantt*, 796 F.Supp.

698, 700 (E.D.N.Y. 1992). Plaintiffs' motion for a preliminary injunction was denied in the Southern District of New York on August 13, 1992. *See* Ex. E of Graber Decl. Opp. Prelim. Inj.

(C) Compactness of the 12th CD

(1) Description of the 12th CD

Plaintiffs contend that the 12th CD is "extraordinarily contorted, irregular, and bizarre." Compl. ¶ 38. According to the plaintiffs, "[t]he 12th CD is an object of national ridicule because of its shape, and is derisively referred to in the national press as the 'Bullwinkle' district." Compl. ¶ 39; *see* Appendix A, enlargement of an official congressional district map, entitled "New York State, 1992 Congressional Districts," obtained from the New York State Board of Elections and marked to show the 12th CD. The 12th CD encompasses parts of three of the five boroughs of New York City and has approximately 813 sides, "us[ing] about 75 miles of perimeter to enclose less than 14 square miles of area." *Id.* ¶¶ 40-41, 45. This is one of the nine or ten least spatially compact districts in the United States. *See id.* ¶¶ 47-48.

Daniel Polsby, Professor of Law at Northwestern University, explains in his declaration submitted on behalf of the plaintiffs here that the 12th CD is comparable in shape to the North Carolina district struck down in *Shaw v. Reno*, 509 U.S. 630 (1993), and the Georgia district struck down in *Miller v. Johnson*, ---U.S. ---, 115 S.Ct. 2475 (1995). *See* Polsby Decl. ¶ 14. He further explains that the 12th CD is "naturally drawn on a smaller scale because it is located in the center of one of the most populous cities in the world." *Id.*

In the state court hearings, Professor Gartner describes how the 12th CD was constructed:

> What you see when you look at the concentration maps is a band of Hispanics that come across Northern Brooklyn ... with a small incursion into Queens. And, if you forgot about the East River, it

> [the band of Hispanics] comes across Manhattan, into the Lower East Side.
>
> You then see a concentration of Hispanics in Sunset Park and a little bit in Red Hook, and you see a scattering of Hispanics, those Northern Queens Hispanics that I talked about, that we didn't choose to bring up into the Serrano district but we use here (indicating).
>
> And so what we did, as everybody did, is we drew a district that basically looked like this (indicating), with the three legs.

Ex. 7 of Silver Mot. to Dismiss, June 2 Tr. at 123-24. Three days later he continued:

> It's no disrespect to the drafters of this district to say it is aesthetically unpleasing....
>
> Why do we drive down here (indicating)? The population concentration of Hispanics, and similarly in this instance the population concentration of Asians, tells you to drive down that far. We go as far, but not any further, than the Hispanic community goes in this area of Southern Brooklyn(indicating).
>
> Why this strange and peculiar configuration up here (indicating), of 12, as it wanders around? We seek to mimic the Hispanic concentrations up here (indicating), and the same thing in the band across Northern Brooklyn.
>
> ... [T]here is a white population the so-called Grand Street Houses, here (indicating), which we brought out of that district for the purpose of trying to keep as high as possible the Hispanic and Asian population in District 12.

Ex. 9 of Silver Mot. to Dismiss, June 5 Tr. at 243-44.

(2) Tests of Compactness

Researchers have developed three principal measures of compactness. These measures are described in a Congressional Research Service Report dated May 24, 1994 that has been accepted as authoritative by all parties. It is entitled "Congressional Districts: Objectively Evaluating Shapes," by David C. Huckabee.

The three measures described in the report are: the geographical dispersion measure, the perimeter measure and the population score measure. The geographical dispersion measure attempts to quantify a district's diffuseness.[10] *See* Ex. 1 of Second Baer Affirm., Huckabee at 3-5. The perimeter measure uses the total length of a district's perimeter, presuming that the smaller the total length, the more compact the district.[11] *See id.* at 5-6. And the population score measure focuses on where people actually live, rather than strictly on geography to determine the differences in residential patterns.[12] *See id.* at 3-6. All of these measures use a scale from 0.0 to 1.0, designating 1.0 as most compact. The Huckabee report calculates these three compactness measures for every

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[10] One geographical dispersion measurement compares the length and width of the longest axis in a district. However, this measurement can give a "near perfect rating to devious, unnatural figures such as" a snake which curls itself around so that its head and tail are close to each other. Ex. 1 of Second Baer Affirm., Huckabee at 3. Another way of measuring the diffuseness of a district is to compare the district area with the area of a compact figure such as a star or triangle. Still another looks to the district's center of gravity.

[11] Perimeter measures use the total length of a district's perimeter. The usefulness of such a measure is affected by whether the state borders are straight, but is not affected by the absolute size of the districts. *See id.* at 5-6.

[12] One type of population dispersion measure compares the total population contained in the smallest circle that can be drawn around the district with the population of the district. Another makes the same comparison using a polygon constructed with the fewest number of lines that can be drawn around the district.

congressional district in the country, as well as mean scores for each state.

PRLDEF relies upon this report to argue that the 12th CD is not bizarrely shaped, especially by New York's standard. New York's average measure for geographical dispersion was 0.30, for perimeter 0.20, and for population 0.64. *See id.* at 17. PRLDEF points out that ten of New York City's fourteen congressional districts are below New York State's mean for perimeter score, and that nine are below New York State's mean for population score. *See* PRLDEF Mem. Opp. Sum. Judg. at 22. In addition, New York's Eighth Congressional District has the lowest dispersion and population scores in New York City. *See id.* at 22-23. The 12th CD has the lowest perimeter score. *See id.* at 23. Thus, PRLDEF intervenors conclude that the 12th CD "does not substantially deviate from New York's traditional" districting criteria. *Id.* at 25.

Plaintiffs, while conceding that the Huckabee report is authoritative, note that

> New York's 'spread' is comparable to that of most other states, and especially the more populous states toward the right end of the spectrum [less compact]. Indeed, its average score ... is comparable to that of Texas, Georgia, and North Carolina, the three states where racial gerrymanders were struck down. Note also that the 12th CD, which scores a .122, would appear close to the lowest bar on the graph, in very select (non-compact) company.

Pltff Reply Mem. Sup. Sum. Judg. at 32-33. Furthermore, plaintiffs note that the 12th CD's perimeter score is a .021, "the very bottom of the New York 'spread,' and is among the lowest scoring districts in the nation." *Id.* The Huckabee report also informs that the 12th CD has the second lowest "dispersion" score in New York and ranks 427th out of 435 districts in the nation. *See* Ex. 1 of Second Baer Affirm., Huckabee at 41. Similarly, the 12th CD's population score is the 422nd lowest in the country and tied for second-lowest in New York. *See id.* Finally, the 12th CD has the lowest

"perimeter" score in New York and ranks 428th in the nation. *See id.*

(D) History of This Litigation

Plaintiffs brought this action in June 1995, anticipating the Supreme Court's decision in another racial gerrymandering case, *Miller v. Johnson*, ---U.S. ---, 115 S.Ct. 2475 (1995). Plaintiffs requested a three-judge panel, pursuant to 28 U.S.C. § 2284(a), as this action challenges the constitutionality of the redistricting process. This court certified the reapportionment claim to be heard by a three-judge court despite defendant Silver's objection. Pursuant to 28 U.S.C. § 2284(b)(1), the Chief Judge of the United States Court of Appeals for the Second Judicial Circuit appointed this panel to hear this case.

Defendant Silver then filed a motion to dismiss the case which is still pending before the court.[13] Plaintiffs began

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[13] The motion by defendant Silver to dismiss this case is based on the claim that it was barred by res judicata as *PRLDEF v. Gantt*, No. 92-CV-1521 (E.D.N.Y. 1992), and *Reid v. Marino*, No. 9567-92 (N.Y. Sup.Ct. Kings Cty. 1992), determined the districts to be constitutional. This court now finds that not to be the case. Silver argues that because Latinos-- presumably including the present plaintiffs--objected to the enactment of the referees' plan, they are bound by the holding of those two cases that the present plan is constitutional.

To be barred from bringing an action, privity must exist between the plaintiffs in this action and those in the prior action. *See Phillips v. Kidder, Peabody & Co.*, 750 F.Supp. 603, 606 (S.D.N.Y. 1990). The Restatement (Second) of Judgments provides that privity only exists where some legal or consensual relationship between the parties exists. Restatement (Second) of Judgments § 41(1). None of the plaintiffs in this action was a party to *Reid*. Moreover, none of the plaintiffs was a member of any plaintiff, defendant or intervenor organizations in *Reid*. *See* Decl. of Angel Diaz, Reynaldo Coholo, and Denise L. Motley, attached to Robert Popper's Decl. Although defendant Silver argues that African-American and Latino voters were represented in the state court action, thus claiming that the present plaintiffs are precluded, he is wrong. Insofar as this argument rests on the argument that plaintiffs, because they are Latinos, were represented in *Reid*, it contains the same type of racial stereotyping condemned by the Supreme Court in *Batson v. Kentucky*, 476 U.S. 79, 89

(Footnote continued)

preparing a motion for preliminary injunction pending the outcome of the argument before the Supreme Court in *Bush v. Vera*, ---U.S. ---, 116 S.Ct. 1941 (1996). PRLDEF, on behalf of defendant-intervenors Lopez and Acosta, then sought intervention. The court allowed them to submit briefs responding to the plaintiffs' motion for a preliminary injunction. *See* Order, signed by Judge David G. Trager, dated May 14, 1996. In addition, at the July 1 hearing, the court allowed all parties who so moved to intervene. This included those represented by Wooten and AALDEF, as well as Congresswoman Carolyn B. Maloney. In addition, Delco Cornett intervened for the plaintiffs at the hearing.

On July 17, 1996, this court denied plaintiffs' motion for a preliminary injunction.

Plaintiffs now move for summary judgment, as has defendant-intervenor PRLDEF.

(1986) and in *Shaw v. Reno*, 509 U.S. 630, 648 (1993). Thus, res judicata does not apply here.

Moreover, the issue raised by plaintiffs in this action was not addressed at all in the state court action. Plaintiffs do not desire the same outcome as the plaintiffs and intervenors in the state action, and "indeed, they desire opposite outcomes." Pltff Mem. Opp. Silver Mot. to Dismiss at 14. Here, plaintiffs are arguing that they were segregated on account of their race by the New York State Legislature's redistricting plan in violation of their constitutional rights. In *Reid*, the issue being addressed was the completely contrary claim that the State Legislature failed to consider race sufficiently when adopting its plan.

Apart from the difference in parties and issues, where there exists a major change in constitutional law, as has occurred here, res judicata may no longer apply. *See Snyder v. Newcomb Oil Co., Inc.*, 194 A.D.2d 53, 60 (4th Dep't 1993) ("Res judicata and its related doctrines are flexible, not absolute, and give way in extraordinary circumstances such as a change in the law.") (citations omitted). In the earlier litigations in state and federal court, Latinos were arguing that § 2 was not complied with unless the maximum number of majority-minority districts are created. The claim here is based on new law developed subsequent to those cases. *See Miller v. Johnson*, ---U.S. ---, 115 S.Ct. 2475, 2492-94 (1995).

Discussion

Plaintiffs maintain that the redistricting plan adopted by the New York State Legislature violates their Fourteenth and Fifteenth Amendment rights by treating them differently under the law and by abridging their voting rights on account of race. *See* Compl. ¶ 66-67. They predicate this claim on their contention that race was the predominant factor used by the Legislature to determine the boundaries of New York's 12th congressional district.

According to plaintiffs, the referees' redistricting plan "implies that the ethnic background of Hispanics is determinative of their character, more so than political or cultural influences, and thus, insults and stigmatizes the Hispanic residents of the 12th CD." *Id.* ¶ 56. Similarly, because the number of African-American voters within the 12th CD was intentionally limited, the plan causes African-American voters "to be treated differently under the law on account of their race." *Id.* ¶ 58. And, "by creating a tri-partite district system, in which there are (1) 'Hispanic' districts, (2) 'black' or 'African-American' districts, and (3) 'white' districts, the Referees' Plan creates a racially separate, and inherently unequal, district system, in which the voting rights of plaintiffs are diminished." *Id.* ¶ 62.

In their cross-motion for summary judgment, defendant-intervenors rebut plaintiffs' claims. They argue that the arguably racial intent of the referees cannot be ascribed to the New York State Legislature, whose principal purpose for adopting the referees' plan was to protect incumbents. They also argue that while not compact, the Legislature created the 12th CD to protect incumbents and to embody communities of interest. The supremacy of these concerns thus subverts the contention that race was the predominant factor in the Legislature's adoption of the redistricting plan. Furthermore, they claim that compactness of districts is not a traditional criterion under New York law, and, consequently, the New York State Legislature was privileged to ignore that criterion in favor of incumbency.

Analysis of these contentions requires us to determine: 1) whether the facts of this case warrant the application of strict scrutiny to the Legislature's adoption of the 12th CD, and if so, 2) whether the act of the Legislature satisfies the strict scrutiny standard. The Supreme Court has articulated a "variety of formulations for the application of strict scrutiny" in the redistricting context. *Bush v. Vera*, ---U.S. ---, 116 S.Ct. 1941, 1951 (1996) (plurality opinion).[14] Justice O'Connor's

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[14] Justice O'Connor proceeds to list some of the formulations:

> Strict scrutiny applies where "redistricting legislation ... is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles," or where "race for its own sake and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines," and "the legislature subordinated traditional race-neutral districting principles ... to racial considerations."

Bush, 116 S.Ct. at 1951 (quoting *Shaw v. Reno*, 509 U.S. 630, 642 (1993) and *Miller v. Johnson*, ---U.S. ---, 115 S.Ct. 2475, 2486, 2488 (1995)) (citations omitted).

In its brief, PRLDEF, quoting Justice O'Connor's plurality opinion out of context, recasts the opinion to omit the requirement that traditional districting principles be race neutral, and adds a requirement that for a prima facie case, plaintiffs must establish a deviation from the state's traditional districting criteria.

> *Shaw* and its progeny require plaintiffs to prove two elements to establish a prima facie case. They must prove both that (1) the district substantially deviates from the State's traditional redistricting criteria and (2) that race was the predominant motivation for the State's substantial deviation.

PRLDEF Mem. in Opp. Sum. Judg. at 10. The first requirement is not to be found in the plurality opinion, and the second mischaracterizes the Supreme Court's test. As the full quotation of Justice O'Connor's citation to *Miller v. Johnson* in *Bush* makes clear, the relevant test is whether:

> race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to

(Footnote continued)

plurality opinion clearly established that "[f]or strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were 'subordinated' to race. By that, we mean that race must be 'the predominant factor motivating the legislature's [redistricting] decision.' " *Id.* at 1951-52 (quoting *Miller v. Johnson*, ---U.S. ---, 115 S.Ct. 2475, 2488 (1995)). The following discussion will reveal both that the application of strict scrutiny is appropriate in this case and that the use of race in the creation and adoption of the 12th CD does not withstand strict scrutiny analysis. Thus we find that the 12th CD is unconstitutional as presently drawn.

(A) Predominance of Race in the Plan

The facts stated above portray in broad strokes the unquestionably race-based nature of the referees' redistricting plan. *See* Ex. Q of Silver Opp. Sum. Judg., Assembly Tr.; Ex. R of Silver Opp. Sum. Judg., Senate Tr.; Ex. B of PRLDEF Opp. Prelim. Inj., Special Master's Report; Ex. C of PRLDEF Opp. Prelim. Inj., Referees' Report. Both the referees' final report and the testimony of Dr. Alan Gartner provide direct evidence of the intent to segregate voters by race in the plan. The referees' report lists the strictures of population equality and the Voting Rights Act as most fundamental to their redistricting efforts, after which they considered traditional criteria. *See* Ex. C of PRLDEF Opp. Prelim. Inj., Referees' Report at 15. This prioritization demonstrates the predominance of race in their redistricting plan. Furthermore, the referees admit to having perfected their race-based redistricting through the use of a race-sensitive computer program, voter registration lists and surname dictionaries to identify Latino and Asian names. *See id.* at 33 n. 32.

> compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations.

Miller, 115 S.Ct. at 2488.

Professor Alan Gartner described with great precision the race-sensitive methodology that guided the creation of the 12th CD.[15] Both the computer system's ability to depict racial concentrations and the perceived need to create an additional Latino district fostered the referees' racially-motivated plan. Dr. Gartner stated that the referees subordinated all other districting criteria except equal population to racial concerns. *See* Ex. 7 of Silver Mot. to Dismiss, June 2 Tr. at 111; Ex. 9 of Silver Mot. to Dismiss, June 5 Tr. 236, 243-44.

In addition to these two indicia of specific intent, the shape of the 12th CD further evidences the primacy of race in the referees' plan. It alone may demonstrate that race was the dominant factor in its creation. In 1993, the Supreme Court first found that an oddly-shaped district in which each curve corresponds to a racial concentration may be evidence that voters are being segregated by race. "A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid." *Shaw v. Reno*, 509 U.S. 630, 647 (1993). Moreover, Justice O'Connor found that "[i]n some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat [e] ... voters' on the basis of race." *Id.* at 646-47 (citation omitted).

In every redistricting case since *Shaw v. Reno*, the Supreme Court has considered, among other factors, the compactness of the challenged district to determine whether the shape of

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[15] In their 3(g) statements, defendant-intervenors make much of the fact that Professor Gartner's statements were unsworn. *See* PRLDEF 3(g) ¶ 19. It is difficult to know what to make of this claim. We do note that the sole basis of the challenge is that the statements are not sworn. Defendants do not question Dr. Gartner's expertise, nor do they impugn his integrity. Moreover, defendants in no way dispute that the referees relied on his analysis and recommendations when devising their plan.

the district was based on racial considerations. See *Bush v. Vera*, ---U.S. ---, 116 S.Ct. 1941, 1952 (1996), *Shaw v. Hunt*, ---U.S. ---, 116 S.Ct. 1894, 1901 (1996), *Miller v. Johnson*, ---U.S. ---, 115 S.Ct. 2475, 2489-90 (1995). Moreover, the shape need not rise to the level of "bizarre" in order to present a cognizable equal protection claim. *See Miller*, 115 S.Ct. at 2486. The Supreme Court explained in *Miller* that:

> Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines. The logical implication ... is that parties may rely on evidence other than bizarreness to establish race-based districting.

Id. at 2486.

As in these Supreme Court cases, the congressional district at issue here is unquestionably oddly shaped. Plaintiffs provided the court with large maps of the 12th CD that clearly demonstrate the magnitude of the distorted, elongated district. Not only does the district curve and weave among street blocks, at points it is connected purely by parks and highways, such as the Brooklyn-Queens Expressway. Plaintiffs allege that this 12th CD is so bizarre on its face that it is 'unexplainable on grounds other than race.'" *Shaw v. Reno*, 509 U.S. 630, 644 (1993) (quoting *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)). Intervenors contend that in a city of peninsulas and islands, creating districts that are perfect circles is not a realistic possibility. This is quite correct, but an 813-sided district certainly was not required either. A map of the 12th CD, which is appended to this opinion, is perhaps the most telling evidence of the predominant role of race in the formulation this district's lines.

Defendants and intervenors argue that the 12th CD is no less compact than its sister districts in New York. It is true that New York's congressional districts seem to suffer a chronic lack of compactness. In fact, five of New York's congressional districts in 1992 ranked as the country's least compact districts (the 5th, 7th, 8th, 9th and 12th--8th or 12th being New York's worst depending on the standard of measure). *See* PRLDEF Mem. Opp. Sum. Judg. at 20; Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 Mich. L.Rev. 483, 564 (1993). "New York's mean level of dispersion ranked identically at .30 during both the 1980s and 1990s [in a range of 0.0 to 1.0]. Its mean perimeter score also remained identical, coming in at .20 during the 1980s and 1990s [a perfect score is 1.0]." *Id.* at 20-21. Citing the sorry state of compactness of districts in New York on the whole, defendants and intervenors thus maintain that the 12th CD is as compact as many others. Plaintiffs, however, point out that the dispersion score for the 12th CD is far below New York's average, "in very select (non-compact) company," ranking 427th lowest out of 435 total districts. Pltff Reply Mem. Sup. Sum. Judg. at 33.

Nevertheless, defendants maintain that the 12th CD is not bizarre because it is contiguous and the residents share a sense of community. As already described, the district at points is barely contiguous and, as will be discussed, *infra* at § D(2), no such community of interest exists.

(B) Predominance of Race in Enactment and Approval of the Plan

Not only was race the predominant factor in the referees' creation of their redistricting plan, it was also paramount to the Legislature's enactment of the plan. The preeminence of race is evidenced in three ways: statements by legislators during the Senate and Assembly debates regarding the adoption of the plan; the plans and recommendations submitted by the Legislature's representatives to both the special master

and the referees; and statements by legislators during hearings before the special master.

The Legislature was fully aware of the perceived need to create majority-minority districts within New York City. When proposing the plan to the Legislature, Assemblyman Gantt reviewed the criteria, including the racial criterion, the referees used to create the districts. *See* Ex. Q of Silver Opp. Sum. Judg., Assembly Tr. at 4. In fact, the majority of discussions among members of the legislature revolved around the reasons for the referees' creation of the oddly-shaped districts. These geometric curiosities were justified by the VRA requirements of creating majority-minority districts, as well as the concerns as to whether an additional Hispanic or African-American district would be created. *See id.* at 17-20, 25-30, 41-47, 49-52, 57; Ex. R of Silver Opp. Sum. Judg., Senate Tr. at 37, 42-43, 67-72, 80-81, 82, 95-98, 105-07. Perhaps most informative is Senator Skelos' own statement explaining the cause of the 12th CD's shape:

> I think you should also point out that sometimes that's [extremely thin areas of districts] necessitated by the creation of minority districts in neighboring communities to satisfy the Voting Rights Act.

Ex. R of Silver Opp. Sum. Judg., Senate Tr. at 42.

Moreover, members of both houses of the Legislature submitted to the referees and special master versions of a redistricting plan that included a "tri-county Hispanic district" similar to the 12th CD. Ex. C of PRLDEF Opp. Prelim. Inj., Referees' Report at 26 n. 22; *see* Ex. B of PRLDEF Opp. Prelim. Inj., Special Master's Report at 37. The fact that both the Senate and Assembly created and submitted to the referees and special master a tri-county Hispanic district similar to the 12th CD renders absurd the argument that now they ought not be charged with drawing such a district.

Legislators also verbally embraced the primacy of race in redistricting during a hearing held by the special master. *See* Ex. L of Silver Opp. Sum. Judg., Special Master Hrg. Tr. at

13, 16-17, 88-92, 100-02, 107. These aforequoted statements exemplify the extent to which racial issues pervaded the special master's hearing.

Thus, the transcripts of the legislative deliberations and the submissions to the courts and subsequently to DOJ makes it abundantly clear that the need to comply with the perceived requirement of maximization of majority-minority districts was the predominant motive in the Legislature's adoption of the referees' plan, overriding any other concern including incumbency.

The Governor's statements also evidence awareness of the centrality of race to the redistricting process. Upon signing the redistricting bill, the Governor stated that the main objectives of reapportionment were to comply "fully with the Constitution and the Voting Rights Act." Ex. S of Silver Opp. Sum. Judg., Governor's Statement Explaining Bill Signing. He then discussed the federal and state courts' involvement in redistricting and summarized the differences between the plans: "[O]ne is generally perceived as better for Latino minorities, the other for African Americans." *Id.* The Governor continued to explain that although he urged the Legislature to alter the court-created plans, the Legislature refused: "Instead, the Legislature has now chosen simply to adopt in legislation the plan created by the state court saying it is close to what they might have done." *Id.* The Governor then criticized the Legislature for not working harder to create a plan with an additional majority-Latino district.

The Governor, nevertheless, signed the bill, acknowledging that the Legislature "has at least a continuing opportunity to amend this plan--which it should surely do...." *Id.* The Governor recognized that it was preferable for the Legislature to adopt the state court plan, which it then could amend, than to be saddled with the federal plan, which it could not easily alter.

(C) The Legislature's Acquiescence in the Use of Race

Despite the overwhelming evidence that race served as the predominant factor in the referees' creation of the 12th CD, both defendants and intervenors argue that the Legislature cannot be held accountable for its race-based nature. They argue that because non-racial considerations, particularly incumbency-protection, partially may have motivated the Legislature's acceptance of the referees' plan, the Legislature is not bound by the fact that race was the predominant factor in the creation of the 12th CD. We reject this argument on three grounds. First, whatever their non-racial concerns, by attaching the referees' report to their Department of Justice pre-clearance submission, the Legislature affirmatively adopted the race-based methodology and rationale the referees used to create the plan. Second, the primacy of race is apparent on the face of the plan, and as such the Legislature ought be held accountable for such race-based redistricting. Third, recent Supreme Court cases reveal that in cases of racial gerrymandering, such as the one before this court, a legislature will be held responsible for the resulting constitutional violations in spite of contentions that the legislature was merely attempting to comply with the perceived maximization requirements of the Justice Department.

The DOJ preclearance procedures require the legislature to explain the development of its redistricting plan. The only evidence that Senator Skelos and Assemblyman Gantt (the signatories of New York's § 5 submission) provided to fulfill this requirement was the referees' report. *See* Ex. 4 of Popper Decl., DOJ Submission. Specifically, the Legislature's preclearance submission to the DOJ stated that the referees' report "explains in detail the background leading up to the development of this plan by the referees for the State Supreme Court." *Id.* Under the circumstances, where this is the only document used to justify the Legislature's action, this submission binds the Legislature as an adoptive admission to all

of the statements and policies contained therein.[16] *See Grundberg v. Upjohn Co.*, 137 F.R.D. 365, 369-71 (D.Utah 1991) (finding that drug protocol reports used by defendant when seeking FDA approval are admissible as adoptive admissions in product liability action). By using the referees' report, the Legislature authorized the referees to speak for it with regard to the methodology and development of the redistricting plan.

Moreover, the fact that this was the only document submitted to DOJ by the Legislature is significant not only for its affirmative reliance on this race-based report, but also for the absence of any explicit discussion of the primary role of incumbency. Courts have given weight to such omissions in submissions for § 5 preclearance. In *Vera v. Richards*, 861 F.Supp. 1304, 1339 (S.D.Tex. 1994), *aff'd*, *Bush v. Vera*, ---U.S. ---, 116 S.Ct. 1941 (1996), the district court noted that "if incumbent protection was as important to the process as the State witnesses testified ... it is surprising that the State offered virtually no such evidence ... in its voluminous § 5 preclearance submission to the Justice Department." The same can be said here. Moreover, plaintiffs emphasize that, under Fed.R.Evid. 801(d)(2)(B), the referees' report and court transcripts are statements in which the Legislature has "manifested an adoption or belief in its truth."

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[16] Moreover, during the Senate debate regarding the bill incorporating the referees' plan, Senator Gold acknowledged that the Legislature was adopting the plan's methodology:

> Now, "We didn't do it," is that what you said? "We didn't do it; this is just the court." Well, baloney. The Supreme Court--"supreme" if you start at the bottom, in this case--didn't print this piece of paper. We printed it. We printed it. So by us printing it, you have now adopted that philosophy and you are about to now engage in one of the most horrendous things you could do to a county.

Ex. R of Silver Opp. Sum. Judg., Senate Tr. at 52 (discussing incumbency protection).

PRLDEF takes issue with plaintiffs' use of the referees' report and their experts' testimony to impute racial motivations to the Legislature's adoption of the 12th CD. PRLDEF argues that because the Legislature did not create the plan itself or make an affirmative statement of adoption, such a conclusion cannot be reached here on summary judgment. *See* PRLDEF Mem. Opp. Sum. Judg. at 42-44. However, because the referees' and their experts' statements are admissions here, PRLDEF's argument fails. Moreover, the record that incumbency was always subordinated to race cannot be gainsaid. As discussed, *infra* at section (D)(1), the creation of the 12th CD prevented the protection of an additional incumbent. In addition, none of the defendants has offered, in their affidavits or memoranda, any description of the evidence that they would present at a trial to contradict this conclusion. The Legislature cannot distance itself from its race-based plan and now honestly assert that race was a secondary consideration to incumbency.

Furthermore, the Legislature should be held accountable for the racial intent embodied in the redistricting plan because such intent is apparent on the face of the statute passed by the Legislature. As plaintiffs argue, the Legislature may be held liable for the referees' intent since a state actor may be charged with otherwise private discrimination by seeking to enforce it. *See Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177-79 (1972); *Shelley v. Kraemer*, 334 U.S. 1, 17-20 (1948) (holding that state enforcement of otherwise private restrictive covenants violated Equal Protection Clause). Here, of course, the referees were not private actors, but private individuals fulfilling a public function.

Defendants also argue that the Legislature ought not be held accountable for the racial premise of the plan because it was merely trying to act in accordance with perceived DOJ preclearance policy. We acknowledge that the redistricting process clearly forced the New York Legislature to perform the difficult task of walking a tightrope between the perceived requirements of the VRA and the Equal Protection Clause of the Constitution. Nevertheless, we cannot absolve the

Legislature of its responsibility because it was acting according to the misguided and unlawful directions of DOJ. Although DOJ had not rejected a congressional districting plan in New York, in 1991 DOJ objected to the redistricting of the New York City Council, *see* Ex. P of PRLDEF Opp. Prelim. Inj., DOJ Ltr. dated July 19, 1991, and in 1992 objected to a proposed Assembly redistricting plan because of its treatment of "the northern Manhattan area." Ex. Q of PRLDEF Opp. Prelim. Inj., DOJ Ltr. dated June 24, 1992. There is no question that New York's legislators were cognizant of and concerned about the strictures of DOJ's interpretation of the VRA. *See* Ex. Q of Silver Opp. Sum. Judg., Assembly Tr. at 3; Ex. R of Silver Opp. Sum. Judg., Senate Tr. at 79, 85-89.

New York thus found itself in a position similar to the other states performing redistricting. Similar state action, based on prior DOJ expressions, have been rejected by the Supreme Court. The Supreme Court has found that DOJ had unlawfully interpreted the VRA to require the maximization of majority-minority districts. "Instead of grounding its objections [to districting plans] on evidence of a discriminatory purpose, it would appear the Government was driven by its policy of maximizing majority-[minority] districts. Although the Government now disavows having had that policy, the ... well-documented factual finding was that the Department did adopt a maximization policy...." *Miller v. Johnson*, ---U.S. ---, 115 S.Ct. 2475, 2492, 2494 (1995) (rejecting such a policy as "a shortsighted and unauthorized view of the Voting Rights Act"). All of these legislatures have labored to develop their redistricting plans against the background of multiple preclearance objections and rejections by DOJ based on this misguided interpretation. *See id.* at 2493; *Johnson v. Mortham*, 926 F. Supp 1460, 1486 (N.D. Fla. 1996). In fact, most of these majority-minority district plans were initially created in response to prodding by the Department of Justice. *See, e.g., Miller*, 115 S.Ct. at 2483-84; *United States v. Hays*, ---U.S. ---, 115 S.Ct. 2431, 2433-34 (1995); *Shaw v. Reno*, 509 U.S. 630, 633 (1993).

But the Supreme Court has not responded kindly to legislators' arguments that DOJ's interpretation of the VRA compelled their race-based redistricting plans. The Supreme Court has pointed out that the state legislatures could have requested a declaratory judgment from the District Court for the District of Columbia to resolve the issue. *See e.g., Miller v. Johnson*, 115 S.Ct. at 2484.

Bush v. Vera, ---U.S. ---, 116 S.Ct. 1941 (1996), provides facts most similar to the present case. Like the situation before this court, it was a "mixed motive case" in which the legislature conceded that one of its objectives was to create additional majority-minority districts, but also explained that competing goals (including protection of incumbents) impacted its redistricting. *Id.* at 1952. The district court reviewed three basic factors. First, it considered the irregular shape of the three districts in question, noting that in 1980 Texas's plan ranked average in compactness and in the 1991 plan ranked among the worst in the nation in "compactness and regularity of its district shapes." *Id.* Second, the court perused the legislature's transcripts, finding explicit references to assuring majority-minority districts. *See id.* at 1952-53. Finally, the court contemplated the computer program that aided the creation of the plan by "permitt[ing] redistricters to manipulate district lines on computer maps, on which racial and other socioeconomic data were superimposed." *Id.* at 1953. The district court then concluded that race was the "predominant factor" affecting the creation of the districts. The Supreme Court affirmed the district court's decision in *Bush*, noting that "the direct evidence of racial considerations, coupled with the fact that the computer program used was significantly more sophisticated with respect to race than with respect to other demographic data, provides substantial evidence that it was race that led to the neglect of traditional districting criteria here." *Id.* Despite the conceded desire of the legislature to protect incumbents, these indicators of the supremacy of racial considerations (including a race-sensitive computer districting program) led the Supreme Court to find the *Bush* district unconstitutional.

Plaintiffs are, therefore, correct in their argument that the New York State Legislature must be held responsible for the intent embodied in the redistricting legislation that it has passed. "Even if it acts under pressure, it has chosen to act." Pltff Mem. Sup. Sum. Judg. at 14. The Legislature must bear responsibility for the constitutional violations in its plans, even if its actions were a consequence of pressure imposed by DOJ's erroneous interpretation of the VRA.

(D) Subordination of Traditional Factors to Race in the Plan

Aside from the overwhelming--and essentially uncontested--affirmative evidence that race was the predominant factor, defendants and intervenors have offered nothing to contradict the equally-powerful evidence that traditional, non-racial factors were also subordinated to race in the referees' creation and the legislature's enactment of the plan. As a preliminary matter, since we are dealing with issues of intent, the significance of the referees' repeated statements in their report that they considered "traditional criteria" only after considering race cannot be overstated. While the implementation of their plan confirms their intent, these statements alone demonstrate that all traditional districting criteria, including incumbency, were subordinated to race in the drawing of the 12th CD.

(1) Incumbency

Defendant-intervenor PRLDEF relies upon the fact that the referees' plan protected incumbents to argue that the 12th CD was not the product of race-based districting. *See* PRLDEF Mem. Opp. Sum. Judg. at 40-42. There is no doubt that the peculiarities of some district lines reveal that protection of incumbents substantially affected the shape of the districts in the referees' plan. Yet while incumbency took priority over all other traditional criteria in the creation of the districts, nevertheless it was at all times still secondary to race. *See* Ex. C of PRLDEF Opp. Prelim. Inj., Referees' Report at 15, 30.

The referees' report does make mention of and pay deference to the notion of "displacement," a term we view as a proxy for incumbent protection.[17] According to the referees' report:

> For the constituents in each of the five present minority districts, the Referees' Final Plan displaces the least number.
>
> On the average, the Master's Final Plan "displaces" 58% of the constituents, while the Referees' Final Plan "displaces" only 25%.
>
> In the Master's Plan, four of the five districts displace more than 50% of the population, while in the Referees' Final Plan, no district displaces more than 39%.

Id. at 51-52.

There is also no question that the Legislature likewise considered incumbency; nor was there anything improper in its doing so. The legislators voiced their quite legitimate concerns about the ability of representatives to maintain relationships they had already developed with their constituents. *See, e.g.*, Ex. Q of Silver Opp. Prelim. Inj., Assembly Tr. at 9, 54, 56; Ex. R of Silver Opp. Prelim. Inj., Senate Tr. at 88. More significantly, the powerful role that seniority plays in the functioning of Congress makes incumbency an important and legitimate factor for a legislature to consider.

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[17] Although the Assembly's interest in incumbency-protection led it to submit a statement to the federal court opposing the special master's plan in part on that ground, Ex. N of Silver Opp. Sum. Judg., Assembly Objections to Special Master Report at 14-15, no such candid expression of concern for incumbency can be found in the referees' report and the testimony by the referees and the experts who aided the referees. It is quite evident, however, that (after equality of population and race) the factors listed in the referees' report were not the actual priorities. Rather, incumbency protection was the third most significant factor in the referees' report.

Nevertheless, while incumbency explains, in major part, the final boundaries of various districts, without the factor of race, the 12th CD, as a majority-Latino district, would never have been created. A different district, to protect another incumbent, would have been the politically-desirable choice. However, the race-based maximization policy of DOJ led to the creation of a seventh majority-minority district and, consequently, eliminated the possibility of protecting still another incumbent.[18] The important role that incumbency played is best summarized as follows: only when the perceived racial requirements of the VRA were met did incumbency become the principal focus of the referees' plan, and incumbency was always sacrificed to meet these racial requirements. Incumbency was always secondary to race.

(2) "Communities of Interest"

Maintaining a "community of interest" traditionally also has been considered a legitimate goal in creating a districting plan. Courts will find the existence of a community of interest where residents share substantial cultural, economic, political and social ties. *See, e.g., Wilson v. Eu*, 823 P.2d 545, 573 (Cal. 1992) (en banc). In *Miller v. Johnson*, ---U.S. ---, 115 S.Ct. 2475, 2484 (1995), the Supreme Court found that the 11th Congressional District of Georgia failed to incorporate a community of interest. The district contained four discrete urban centers connected only by hundreds of miles of rural counties and narrow swamps. *See id.* The Supreme Court affirmed the Georgia district court's finding that the 11th Congressional District was unconstitutional. According to the Court, the 11th Congressional District

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[18] Plaintiffs argue that because there was no incumbent in the 12th CD, incumbency could not have been a factor considered more than race. However, although only the 12th CD is being challenged by the plaintiffs, the entire plan was created by the legislators at one time. Thus, because there are incumbents surrounding the 12th CD, incumbency could have been and was, in fact, considered.

> lost the black population of Macon, but picked up Savannah, thereby connecting the black neighborhoods of metropolitan Atlanta and the poor black populace of coastal Chatham County, though 260 miles apart in distance and worlds apart in culture. In short, the social, political and economic makeup of the Eleventh District tells a tale of disparity, not community.

Id. (citation omitted).

Defendants and intervenors argue that the 12th CD is constitutional because it encompasses communities of interest among its Latino members and among its Asian members. We conclude that even if such a community exists within the Asian population of the 12th CD, none exists within the Latino population. Thus the claim that the 12th CD is constitutional because it satisfies the traditional "community of interest" criterion fails.

In support of their contention that a community of interest exists, state defendants observe that all residents of the 12th CD vote for the same candidates for mayor, comptroller and public advocate. *See* State Mem. Opp. Prelim. Inj. at 27. By this standard, every district wholly within the City, no matter how drawn, would constitute a community of interest. State defendants also note that, unlike congressional districts in upstate New York, the 12th CD is confined to a single media market. *See id.*

AALDEF, in particular, argues that the 12th CD embodies a significant community of interest of Asian-American voters who share the same cultural background, economic conditions, service organizations, and media market. The Asian communities of Sunset Park and Chinatown, according to AALDEF, regularly work together, attend the same health clinics, and shop in the same stores. *See* Tchen Aff. ¶¶ 18-38; Lau Aff. ¶¶ 52-55. In addition, the Asian-American community votes similarly, *see* Shen Aff. ¶¶ 6-18; Lau Aff. ¶¶ 46-51, originates from the same area and speaks the same dialect. *See* Tchen Aff. ¶ 24. However, according to Professor Arrington,

"because of the different nationalities of Asians, they have no real community of interests and might not vote together." Ex. K of PRLDEF Opp. Prelim. Inj., Arrington Aff. ¶ 40. Nevertheless, since the record indicates that the Asian-Americans in the 12th CD are mostly of Chinese background, for purposes of these cross-motions for summary judgment we will assume that all Asian-Americans in the 12th CD have a community of interest.

However, similar claims by PRLDEF intervenors do not come close to demonstrating similar shared activities and interests on the part of the Latino population. Thus, unless one accepts the view (rejected repeatedly by the Supreme Court) that race alone can be equated with communities of interest, PRLDEF's argument that the Latinos of the 12th CD form a community of interest does not withstand examination.[19]

PRLDEF contends that the Latino community of interest is evidenced by the common form of discrimination that Latinos experience. *See* PRLDEF Mem. Opp. Prelim. Inj. at 57-67. The one piece of evidence that supports the argument that all Latinos form a community of interest is Professor Allan J. Lichtman's finding of racially polarized voting between Latinos and non-Latinos. *See* Ex. I of PRLDEF Opp. Prelim. Inj., Lichtman Decl. ¶ 7; *see also* Ex. J of PRLDEF Opp. Prelim. Inj., "Preliminary Report on Racial Block Voting and Political Mobilization in New York City, as It Affects Proposed Congressional Districts" at 31. While important, polarized voting in and of itself fails to create a community of interest. Common employment, services, religion, economy, country of origin and culture are more relevant in determining whether a community of interest exists. *See Bush v. Vera*, 116 S.Ct. 1941 1948 (1996); *Carstens v. Lamm*, 543 F.Supp. 68, 91 (D.Colo. 1982); *Wilson v. Eu*, 823 P.2d 545, 573 (Cal.

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[19] We think it important to note that this discussion casts doubt on the notion that all African-Americans in New York City constitute a community of interest, considering their diverse origins, cultural histories, economic statuses, and political and social ties.

1992) (en banc). Defendants and intervenors have not provided this court with any information about such factors.

Plaintiffs, on the other hand, show in their affidavits and complaints that in fact Latinos do not share a community of interest. Indeed, there is compelling evidence in the record that there are serious differences among Latinos. Plaintiff Angel Diaz stated:

> I know that these groups [Dominicans, Ecuadoreans, Panamanians, Mexicans, Cubans, Colombians] in fact have very different cultures and traditions. I also know that members of these groups would regard it as incomprehensible, or even as an insult, to suggest that what they have in common outweighs what is unique about them.

Diaz Decl. ¶ 6. Further, plaintiff Diaz notes that "the groups described as Hispanic or Latino differ in the foods they eat ... in their music ... dance ... [and] in the way they speak." *Id.* ¶¶ 8-10.

Additionally, and "[m]ost important for a politician, these groups tend to have different political concerns." *Id.* ¶ 12. According to plaintiff Diaz, who ran for office in the 12th CD in 1992, "the different Spanish-speaking groups vote differently. In the 1992 election I received very different levels of support from areas that contained different Hispanic groups." *Id.* ¶ 21. Indeed, Professor Arrington, an expert on whom the special master relied when devising his redistricting scheme, likewise found:

> Puerto Ricans may have very different concerns and interests than Hispanics from Central or South American countries. There may be disputes and inter-ethnic conflict between these groups. This would suggest that community of interest principles should lead to the formation, if possible, of a Puerto Rican district distinct from a district dominated by Dominicans, Colombians, and other Central and South Americans.

Ex. K of PRLDEF Opp. Prelim. Inj., Arrington Aff. ¶ 36.

Moreover, the record suggests that the 12th CD, in fact, destroys an existing community of interest. Diaz concluded his declaration saying: "The 12th CD actually cut up the communities of interest that did exist. It made no sense that people in Manhattan could vote in the 12th CD, while my neighbors of 27 years could not." Diaz Decl. ¶ 27.[20]

In light of defendants' failure to produce any evidence of community of interest, such as common country of origin, economy, political views and culture, no finding can be made that a community of interest among Latinos exists in the 12th CD. There is no evidence to demonstrate that all Latinos within the 12th CD share common agendas and concerns, unless race itself creates a community of interest. Furthermore, as plaintiffs have indicated, the 12th CD divided immediately

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[20] Although the point was made for other purposes, John Flateau, the Executive Director of the DuBois Bunche Center for Public Policy, who reviewed the reapportionment plan for the Wooten intervenors, implicitly supports plaintiff Diaz's complaint that he was separated from neighbors.

> Thousands of Hispanic people were deliberately excluded from the Twelfth Congressional District precisely because the primary consideration was not race but incumbency protection. Many Hispanics [sic] communities and residents were included in the several congressional districts adjacent to the Twelfth Congressional District.

Aff. of Flateau ¶ 15.

Furthermore, the transcripts of the State Senate and Assembly debates reveal that legislators believed that the referees' plan disregarded and destroyed communities of interest. Assemblyman Sullivan lamented that people "want to be part of a community, and they have a right to be represented as a community, unless they live in Manhattan, then they are all carved up like salami." Ex. Q of Silver Opp. Sum. Judg., Assembly Tr. at 7. Senator Connor similarly stated that the plan "may serve certain incumbents well, but it doesn't serve, I think, the people in the neighborhoods...." Ex. R of Silver Opp. Sum. Judg., Senate Tr. at 90. Certainly the debates give no indication that the referees' plan was particularly effective at creating and preserving communities of interest, as defendants and intervenors argue here.

adjacent Latino communities with shared social and ethnic backgrounds. *See* Diaz Decl. ¶ 27. In addition, even if we assume, as we do, that some portion of the Latinos in the 12th CD do encompass communities of interest, neither defendants nor intervenors have offered evidence that all Latinos in the 12th CD constituted a single community of interest, let alone enough evidence to create an issue of fact precluding the grant of summary judgment.

Finally, even if we were to assume that all Latinos in the 12th CD constitute a community of interest, the evidence compellingly reveals that communities of interest were not as important as race in the referees' redistricting. Rather, whether such communities were respected by their plan would merely be the fortuitous byproduct of the REAPS computer program used to create the districting plan. REAPS made no effort to distinguish ethnicity among Latinos. As one of the experts assisting the referees noted: "[W]e produced a set of maps that show the concentrations of the three so-called 'protected classes' in New York City; in Census language: 'Non-Hispanic blacks, non-Hispanic Asians' and 'Hispanics.'" Ex. 7 of Silver Mot. to Dismiss, July 2 Tr. at 111. If, by chance, the referees captured any actual Hispanic community of interest in their plan, it was only through happenstance of the computer program, not by design. Certainly this is not persuasive that, given all evidence to the contrary, communities of interest were not subordinated to race in the referees' 12th CD plan.

In sum, the argument that all Latinos in the 12th CD constitute a community of interest is not soundly grounded in fact. Thus we reject defendants' and intervenors' contention that community of interest played as great or greater a role than race in the drawing of the 12th CD.

(E) State Discretion in the Employment of Traditional Criteria

Defendant-intervenors contend that because compactness has not been a traditional districting criterion in New York, the fact that the 12th CD is not compact is not evidence that

compactness was subordinated to race in its creation. Thus, they argue, strict scrutiny is not appropriate because, in New York, compactness is not a traditional factor that was subordinated to race. By comparing the 12th CD with other New York congressional districts both historically and in the 1992 plan, they argue that the 12th CD is compact by New York's own limited standard. They suggest, therefore, that "where a state, like New York, traditionally does not use aesthetic compactness criteria, expressive harms would be incurred by imposing such criteria through a 'federal common law' of compactness." PRLDEF Mem. Opp. Sum. Judg. at 12. Although we agree with defendant-intervenors that states have ample flexibility to choose among traditional districting criteria, we do not believe that they may permit race to become, de facto, the predominant factor.

We take issue with their argument in three ways: 1) when pushed to its logical conclusion it would completely undermine Supreme Court precedent; 2) as a matter of law, if not fact, compactness has been and is a traditional districting criterion under New York law; and 3) PRLDEF's argument that disregarding New York's criteria would result in "expressive harms" turns the *Bush v. Vera*, ---U.S. ---, 116 S.Ct. 1941 (1996) decision on its head.

First, the logical conclusion of defendant-intervenors' argument is that if compactness, incumbency, or other traditional factors have *not* played a role in a state's districting plans, the legislature is free to ignore them. While the Supreme Court might well allow states to give greater weight to incumbency than compactness, it can not be accepted that the Supreme Court would permit states to employ their own "traditional" districting criteria if the net result would be to permit race de facto to become the dominant factor in the drawing of district lines. Although flexibility in defining traditional criteria to account for state variations is, no doubt, needed and desirable, a state's "traditional criteria" can not be permitted to undermine the teachings of *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny. Otherwise, states may simply make race the predominant or even the sole factor by

choosing to disregard all other districting criteria and then claiming that they were not "traditional' criteria within the state.

Moreover, although not necessary to our decision, we think it important to note that PRLDEF's argument that "traditional criteria" under New York law do not require respect for compactness is not supported by the record. To support this argument, PRLDEF introduced evidence of a long history of non-compact and even non-contiguous districts from 1799 to the present. *See* PRLDEF Mem. Opp. Sum. Judg. and Appendix B. Plaintiffs respond that this appendix of approximately fifteen districts out of thousands over the course of 180 years does not prove that compactness has not been a traditional criteria. Rather, plaintiffs maintain that this evidence demonstrates that the Legislature and courts normally do consider compactness when creating districts. *See* Pltff Reply Mem. Sup. Sum. Judg. at 38-39. Plaintiffs' argument concludes: "[A]ll of what the PRLDEF Intervenors assert in their historical narratives could be conceded without contravening plaintiffs' showing that the 12th CD invaded three counties and garnered some of the worst compactness scores in the nation, solely in order to pull Hispanics within its borders." *Id.* at 39. We agree.

It should be pointed out that, contrary to PRLDEF's position, in the Assembly's objections to the special master's report submitted to the federal court, counsel for the Assembly wrote: "[T]he Master and Expert were not free to ignore the need to create compact districts and to preserve communities of interest." Ex. N of Silver Opp. Sum. Judg. at 5.

In any event, even if the Legislature has at times created non-compact legislative as well as congressional districts, New York law clearly indicates that compactness is a state requirement, and no reason has been suggested for treating compactness for congressional districts differently from the compactness requirements for New York's Senate and Assembly districts.

Compactness is a traditional districting criterion under New York law. Since 1946, the Constitution of the State of New York has expressly incorporated compactness and respect for political boundaries into the requirements for New York's Senate and Assembly districts. N.Y. Const., Art. 3, §§ 4 and 5 (1946). The New York City Council Charter also includes the same requirement for city council districts. N.Y.C. Charter, Chap. 2-A, § 52 (attached to Popper's August 14, 1996 Decl.). Additionally, the Court of Appeals *in Schneider v. Rockefeller*, 31 N.Y.2d 420, 428 (1972) (citations omitted) held: "[W]e are of the opinion that the standards for State legislative and congressional apportionment are substantially the same." The New York Court of Appeals went on to explain:

> [T]he constitutional requirements of compactness [and] contiguity .... were adopted for the salutary purpose of averting the political gerrymander and at present are the only means available to the courts for containing that pernicious practice. If the Legislature plays fast and loose with these constitutional requirements, it risks having a districting plan set aside.

Id. at 430.

Thus, it is apparent that even if the compactness criterion has been breached here, compactness traditionally has been considered a standard by the New York State Legislature and certainly by its courts, regardless of any federal mandate. Plaintiffs have also demonstrated that the 12th CD, which traverses three counties in New York City, has 813 sides, and is connected merely by highways at certain points, probably violates the compactness criterion of New York law, and certainly does not comport with federal law.

Finally, defendant-intervenor PRLDEF quotes *Bush v. Vera*, ---U.S. ---, 116 S.Ct. 1941, 1962 (1996) for the proposition: "Significant deviations form [sic] traditional districting principles [...] convey the message that political identity is, or should be, predominantly racial." PRLDEF Mem. Opp.

Sum. Judg. at 12. From this misquotation, PRLDEF derives the conclusion:

> That is, where a state, like New York, traditionally does not use aesthetic compactness criteria, expressive harms would be incurred by imposing such criteria through a 'federal common law' of compactness. This harm would result because only a majority-minority district would be required to be aesthetically compact, conveying that race was the basis for political identity in those districts.

Id. PRLDEF both seriously misstates and misconstrues the law. First, it fails to acknowledge that it has excised the middle portion of the *Bush* quotation. The quote, in full, states: "Significant deviations from traditional districting principles, *such as the bizarre shape and noncompactness demonstrated by the districts here*, cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial." *Bush*, 116 S.Ct. at 1962. This is precisely the harm this court is seeking to avoid.

Second, PRLDEF's argument is premised on the proposition that only majority-minority districts would be compelled to comport with a compactness requirement. The fact that a district is not compact is strong evidence that the district was drawn for non-race-neutral reasons. *See Bush*, 116 S.Ct. at 1961 ("'Shape is relevant ... because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines.'") (quoting *Miller v. Johnson*, ---U.S. ---, 115 S.Ct. 2475, 2486 (1995)). However, the fact that a district is compact does not immunize it from scrutiny. Compactness or its absence would not itself excuse racially motivated districting. Thus, for example, if in Brooklyn, which in many areas is predominantly minority, a Caucasian Assembly district (whether compact or not) is drawn for race-based reasons, its constitutionality would be equally suspect. Nowhere in the *Bush* opinion, or, for that matter, anywhere in recent Supreme Court jurisprudence,

does the Court deviate from the maxim that all districting principles must be applied in a race-neutral fashion. In fact, *Bush* firmly stands for this rule of race-neutrality. Thus, PRLDEF's argument is utterly inapposite.

(F) Strict Scrutiny

Plaintiffs have demonstrated that race was the predominant factor in the creation of the 12th CD. They have also demonstrated that all traditional redistricting criterion were subordinated to race. Defendants have failed to raise a genuine issue of material fact with regard to either issue. Therefore, we review the 12th CD under a strict scrutiny analysis to determine whether the district is constitutional. *See Bush v. Vera*, ---U.S. ---, 116 S.Ct. 1941, 1951-52 (1996). Thus, we must decide whether "the racial classifications embodied in [the 12th CD] are narrowly tailored to further a compelling state interest." *Id.* at 1960. Specifically, in light of the arguments pressed by defendants and intervenors, this requires us to determine 1) whether compliance with the Voting Rights Act is a compelling state interest; and 2) if so, whether the creation of the 12th CD was an act narrowly tailored to achieve such compliance.

(1) Compliance with the Voting Rights Act

The relevant sections of the VRA for our purposes are §§ 2 and 5. Section 2(a) of the VRA provides: "No voting ... practice or procedure shall be imposed or applied by any State ... in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color...." 42 U.S.C. § 1973(a). Section 2(b) of the VRA articulates a "results" test for a violation of § 2(a):

> A violation of subsection (a) ... is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State... are not equally open to participation by members of a class of citizens protected by subsection (a) ... in that its members have less opportunity than other members of the

> electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973(b). Section 5 of the Act requires that a state seeking to change a voting practice or procedure receive either preclearance for the change from DOJ or a declaratory judgment in the United States District Court for the District of Columbia that "such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color...." 42 U.S.C. § 1973c.

Although the Supreme Court has yet to determine specifically whether compliance with the VRA is a compelling state interest, in Justice O'Connor' *Bush* concurrence she found that "the state interest in avoiding liability under VRA § 2 is compelling." *Bush v. Vera*, 116 S.Ct. at 1970 (O'Connor, J., concurring). The four dissenters in *Bush* also found compliance with the VRA to be a compelling state interest; thus a majority of justices support the position that compliance with the VRA is a compelling state interest. *See id.* at 1989 (Stevens, J., with whom Ginsburg, J. and Breyer, J. join dissenting), 2007 (Souter, J., with whom Ginsburg, J. and Breyer, J. join dissenting). Accordingly, for the purpose of adjudicating these summary judgment motions, the correctness of this proposition will be assumed.

(2) The Narrowly-Tailored Test

Turning to the question of whether the creation of the 12th CD was an act narrowly tailored to achieve the purpose of compliance with these sections of the VRA, we begin with § 2.

(a) Section 2 of the VRA

In 1986, the Supreme Court articulated a three-prong test "for finding that the threshold conditions for § 2 liability are present." *Bush v. Vera*, ---U.S. ---, 116 S.Ct. 1941, 1961 (1996) (discussing *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986)).

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.... Second, the minority group must be able to show that it is politically cohesive.... Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it--in the absence of special circumstances, such as the minority candidate running unopposed... to defeat the minority's preferred candidate.

Thornburg v. Gingles, 478 U.S. at 50-51 (citations and footnotes omitted). A minority group is precluded from claiming a violation of § 2 of the VRA in the absence of these three conditions. In other words, there is no threat of liability for noncompliance with § 2 unless the *Gingles* test is met.[21] If there is no threat of liability for noncompliance with § 2, then there is no justification for using race as the predominant factor in the creation of a district. Thus, the redistricting would fail the "narrowly tailored" component of the strict scrutiny test if the *Gingles* test were not met.

The Supreme Court elaborated on the *Gingles* test in *Bush*, 116 S.Ct. at 1961. Preliminarily, the Court noted that "the district drawn in order to satisfy § 2 must not subordinate traditional districting principles to race substantially more than is 'reasonably necessary' to avoid § 2 liability." *Id.* The Court found that when districts are "bizarrely shaped and far from compact" because of "gerrymandering that was racially motivated and/or achieved by the use of race as a proxy," then

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[21] Note that "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993). Thus, "'majority bloc voting'" and "'minority political cohesion'" must always be specifically proven. *Growe v. Emison*, 507 U.S. 25, 40 (1993) (quoting *Thornburg v. Gingles*, 478 U.S. at 51). Furthermore, the Supreme Court cautioned trial courts to consider the "totality of the circumstances." *See Thornburg v. Gingles*, 478 U.S. at 79 (citation and internal quotations omitted); *see also PRLDEF v. Gantt*, 796 F.Supp. 681, 688 (E.D.N.Y. 1992).

compliance with § 2 of the VRA has not been narrowly tailored. *Id.* The Court predicated this conclusion on the view that " § 2 does not require a State to create, on predominantly racial lines, a district that is not 'reasonably compact.'" *Id.* (citation omitted); *see also Shaw v. Hunt*, ---U.S. ---, 116 S.Ct. 1894, 1905-06 (1996) ("[A] plaintiff must show that the minority group is 'geographically compact' to establish § 2 liability."). In other words, the protected class must be "geographically compact" in order to raise a § 2 claim.[22] Moreover, the Court held that "[i]f, because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, § 2 does not require a majority-minority district...." *Bush*, 116 S.Ct. at 1961.[23]

In light of this *Gingles* "tailoring test," we find that there was no legal justification for creating the 12th CD to avoid a

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[22] The Asian-American intervenors do not meet either element of the first requirement of the Gingles test. 478 U.S. at 50. The population of Asian-American citizens is not large enough to form a majority district and it is not geographically compact. The argument that the 12th CD's creation of an Asian-American-influence district demonstrates a narrow tailoring to achieve a compelling state interest is not persuasive. Even if we assume that influence districts must be created in order to comply with § 2 of the VRA, *see Armour v. Ohio*, 775 F.Supp. 1044, 1060-61 (N.D.Ohio 1991) (protecting African-American citizens within one district with a 33% African-American VAP because the court believed that a VRA claim might exist if this significantly-sized minority was split); *Hastert v. State Bd. of Elections*, 777 F.Supp. 634, 654-55 (N.D.Ill. 1991) (finding that the VRA extends protection to minority influence groups, but allowing a minority VAP of 4.9% to be split), the 12th CD encompasses far more than necessary to create an Asian-American-influence district, as such a district would only require combining Chinatown in Manhattan and Sunset Park in Brooklyn. The inclusion of the entire area of Queens was not necessary to achieve that result. Thus, the AALDEF intervenors do not provide a compelling justification for the creation of the 12th CD.

[23] Most recently, the Supreme Court vacated and remanded a three-judge panel's decision upholding the constitutionality of a non-compact majority-Hispanic congressional district in Illinois. *See King v. Illinois Bd. of Elections*, 117 S.Ct. 429 (1996), *vacating and remanding King v. State Bd. of Elections*, No. 95-C-827, 1996 WL 130439 (N.D.Ill. March 15, 1996).

VRA § 2 violation. Aside from the fact that under strict scrutiny the burden is upon the defendants to show that the creation of the 12th CD was necessary to comply with § 2 of the VRA, they have offered nothing of substance to support the claim that the minority population meets the first prong of the *Gingles* test.[24] As elaborated in extensive detail previously, the referees and the legislature explicitly subordinated all traditional districting criteria to race in their respective creation and adoption of the 12th CD. But it can not be seriously suggested that the minority community within the 12th CD is compact by any standard of measure. No one looking at a map of the 12th CD could reasonably suggest that the district contains a "geographically compact" population of any race.

PRLDEF, nonetheless, maintains that for *Gingles* purposes the compactness of the district in question must be compared to the average compactness of the state's districts to determine if there is a substantial deviation. *See* PRLDEF Mem. Opp. Sum. Judg. at 49. According to PRLDEF, since there is no substantial deviation between the compactness of the 12th CD and the average compactness of New York, the 12th CD is narrowly tailored to meet the state's compelling interest in complying with the VRA. *See id.* at 48-51. PRLDEF's contention is without merit.

The 12th CD simply is not compact, even by New York standards. Its perimeter score is the lowest in New York and its dispersion and population scores are second-lowest. *See* Ex. 1 of Second Baer Affirm., Huckabee at 41. Although the actual numerical difference in compactness among New York districts may be small, on compactness scales that range from 0.0 to 1.0 differences of a tenth of one point are quite

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[24] Although plaintiffs have moved for summary judgment and thus it is their burden to come forward with support that no genuine issue of material fact remains to be tried, *see, e.g., Borthwick v. First Georgetown Sec., Inc.*, 892 F.2d 178 (2d Cir. 1989), the strict scrutiny test compels the state to show that its action is narrowly tailored to advance a compelling state interest. *See, e.g., Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989).

significant. The fact that New York, in general, is guilty of having non-compact districts does not abrogate the gross non-compactness of the 12th CD for *Gingles* purposes.

Moreover, we reject this argument because *Gingles* holds that § 2 embodies its own requirement of compactness regardless of the state's districting criteria. Even if a state's traditional districting standards exclude compactness (and we have found that New York's do *not*), § 2 of the VRA requires consideration of compactness. Thus, since the 12th CD is not compact, it is not narrowly tailored to meet a compelling governmental interest.

(b) Section 5 of the VRA

Defendant-intervenors' final contention is that the creation of the 12th CD was justified by a compelling state interest in complying with VRA § 5. In *Beer v. United States*, 425 U.S. 130, 141 (1976), the Supreme Court found that § 5 articulates a narrow goal of "insur[ing] that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *See Bush v. Vera*, ---U.S. ---, 116 S.Ct. 1941, 1963 (1996) (quoting *Beer*). In *Shaw v. Reno*, 509 U.S. 630, 655 (1993), the Supreme Court held that "[a] reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression."

According to these interpretations of the nature and mandate of the VRA, there was no need to create the 12th CD to assure compliance with § 5.[25] Since there were only five minority districts prior to the 1992 redistricting, there would have been no retrogression, and thus no § 5 violation, had the legislature created only six majority-minority districts rather

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[25] We find this to be true even acknowledging that the three-judge federal court in *PRLDEF v. Gantt* found that groups purporting to represent minority voters had established a prima facie case under § 2 of the VRA. *See PRLDEF v. Gantt*, 796 F.Supp. 681, 693 (E.D.N.Y. 1992).

than the seven they did create.[26] Anyone with an elementary knowledge of New York City geography and demographics could recognize that had the Legislature respected compactness and communities of interest, it easily could have created six majority-minority districts. The federal plan amply evidences this. The special master, placing compactness and community of interest ahead of incumbency-protection, created six reasonably compact majority-minority districts. Thus, there was no legal justification for creating the 12th CD to avoid a VRA § 5 violation. The 12th CD thus was not narrowly tailored for the purpose of complying with either § 2 or § 5 of the VRA, and, accordingly, fails to meet the strict scrutiny standard.

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[26] In *Bush*, Justice O'Connor implies that § 5 would not even require six majority-minority districts. "Nonretrogression is not a license for the State to do whatever it deems necessary to insure continued electoral success; it merely mandates that the minority's opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions." *Bush*, 116 S.Ct. at 1963 (finding, in part III(C) of the opinion, that VRA § 5 is not a predicate for seeking augmentation of minority representation).

Conclusion

As a result of DOJ's interpretation of the Voting Rights Act, race became the predominant factor used by the referees in creating the 12th CD and by the Legislature in adopting the referees' plan. The referees segregated voters by race, as evidenced by the criteria set forth in the final report and the testimony of their experts. Furthermore, the Legislature not only adopted the referees' plan, but itself specifically offered plans that segregated voters by race. The evidence demonstrates that, while protecting incumbency was a major factor in the redistricting, it was still secondary to race for both the referees and the Legislature. Neither the defendants nor the intervenors here raised an issue of material fact that counters this conclusion. Finally, there has been no showing that the 12th CD is narrowly tailored to meet the arguably compelling interest of compliance with the VRA. The 12th CD fails to meet the compactness requirement of *Thornburg v. Gingles*, 478 U.S. 30 (1986). Nor does the need to comply with § 5 of the VRA justify the 12th CD. Prior to the 1992 redistricting, there were five majority-minority districts. Without the 12th CD, the 1992 plan had six such districts; thus there would have been no retrogression and no dilution--although a second Latino district, rather than a fifth African-American district, might have been required. Moreover, alternative districting plans that assure minority representation and non-retrogression and which avoid race-based districting are readily available and feasible. For the foregoing reasons, we conclude that the 12th CD was unconstitutionally drawn.

Accordingly, it is hereby ORDERED that:

1. plaintiffs' motion for summary judgment is granted and defendant-intervenor PRLDEF's cross-motion for summary judgment is denied;

2. the New York Legislature shall develop on or before July 30, 1997, a new Congressional redistricting plan in conformity with this court's opinion;

3. on or shortly after July 30, 1997, this court will hold a remedial hearing on the status of the Legislature's redistricting efforts; and

4. defendant Silver's motion to dismiss the case is denied. The Clerk of the Court is directed to enter judgment accordingly.

Dated: Brooklyn, New York
February 26, 1997

/s/ Joseph M. McLaughlin (DYT)
Joseph M. McLaughlin
United States Circuit Judge

/s/ Sterling Johnson, Jr. (DYT)
Sterling Johnson, Jr.
United States District Judge

/s/ David G. Trager
David G. Trager
United States District Judge

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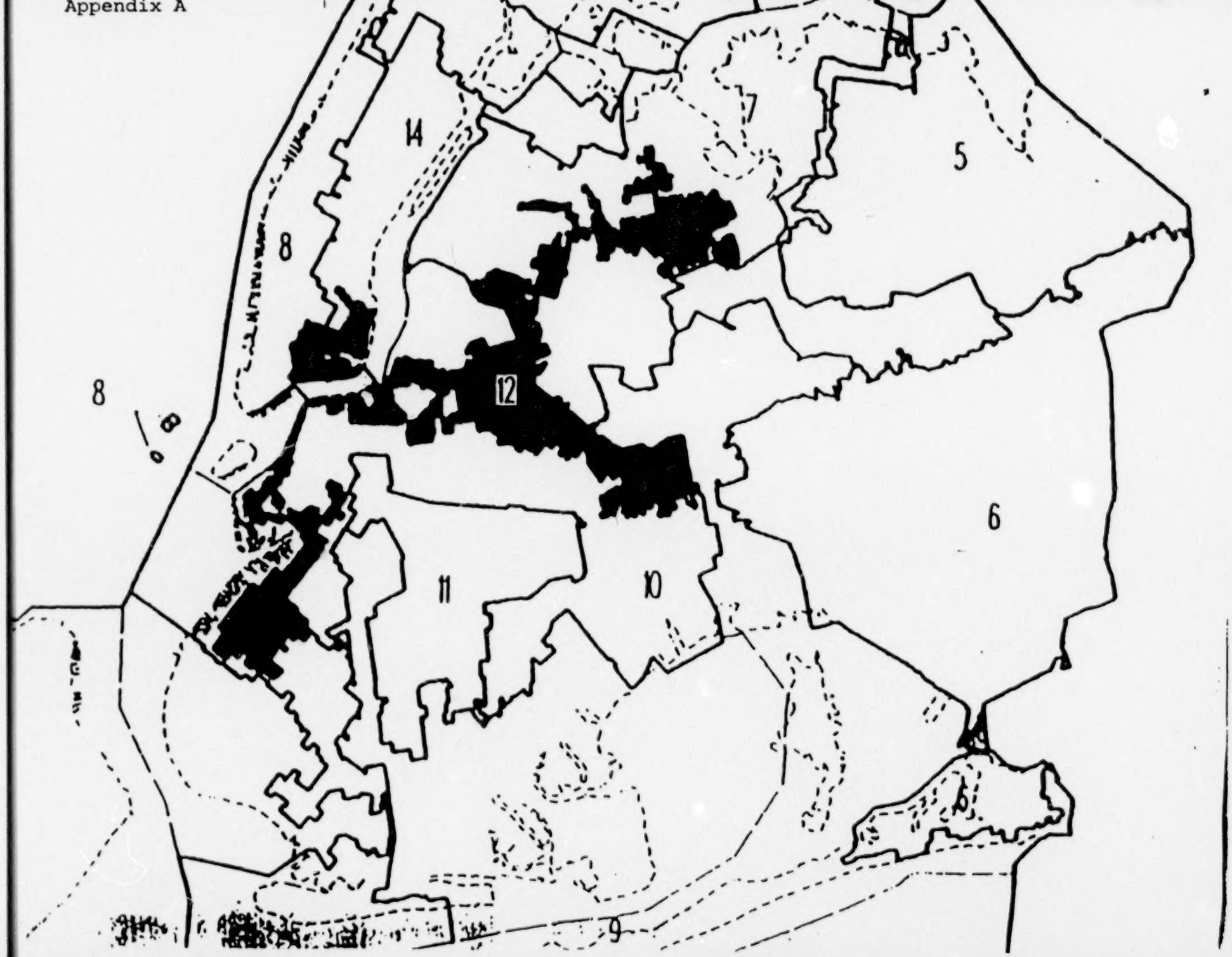
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Member of Congress
14th Congressional District
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Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

ANGEL DIAZ, DENISE L. MOTLEY, and REYNALDO COHOLO,

Plaintiffs,

– against –

SHELDON SILVER, in his official capacity as Speaker of the House for the Assembly of the State of New York; JOSEPH L. BRUNO, in his official capacity as President Pro Tem and Majority Leader of the Senate of the State of New York; GEORGE E. PATAKI, in his official capacity as Governor of the State of New York; THE BOARD OF ELECTIONS of THE STATE OF NEW YORK; OWEN T. SMITH, EVELYN J. AQUILA, and HELENA M. DONOHUE, in their official capacities as commissioners of the Board of Elections of the State of New York; and JOHN DOES 1 THROUGH 50, the names of such defendants being fictitious and unknown to plaintiffs, and referring to those persons who are responsible in their official capacities for the enforcement of legislation that created New York's federal congressional districts,

Defendants.

----------x

FILED
IN CLERK'S OFFICE
U.S. DISTRICT
COURT ED. N.Y.

★ FEB 28 1997 ★

JUDGMENT
95-CV-2591
(JMM, SJ, DGT)

A Per Curiam memorandum and order having been filed on February 27, 1997 granting plaintiffs' motion for summary judgment; denying defendant-intervenor PRLDEF's cross-motion for summary judgment; directing the New York

Legislature to develop on or before July 30, 1997, a new Congressional redistricting plan in conformity with this Court's opinion; directing a remedial hearing on the status of the Legislature's redistricting efforts on or shortly after July 30, 1997; and, denying defendant Silver's motion to dismiss the case, it is

ORDERED and ADJUDGED that plaintiffs' motion for summary judgment is granted; that defendant-intervenor PRLDEF's cross-motion for summary judgment is denied; that the New York Legislature shall develop on or before July 30, 1997 a new Congressional redistricting plan in conformity with this Court's opinion; that on or shortly after July 30, 1997, this Court will hold a remedial hearing on the status of the Legislature's redistricting efforts; and, that defendant Silver's motion to dismiss the case is denied.

Dated: Brooklyn, New York
February 28, 1997

/s/ Robert C. Heinemann
ROBERT C. HEINEMANN
Clerk of Court

C. Daniel Chill, Esq.
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600 Third Avenue
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Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CLERK
U.S. DISTRICT COURT
EDNY
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MAR 25 12:11 PM '97

----------x

ANGEL DIAZ, et al.,
Plaintiffs,

– against –

SHELDON SILVER, et al.,
Defendants.

Index No. 95-CV-2591
(DGT, JMM, SJ)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

----------x

Notice is hereby given that Sheldon Silver, one of the above-named defendants, hereby appeals to the Supreme Court of the United States from the final judgment of the three-judge district court, entered in this action on February 28, 1997 granting, upon plaintiff's summary judgment motion, declaratory and injunctive relief.

This appeal is taken pursuant to 28 U.S.C. § 1253.

GRAUBARD MOLLEN & MILLER

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Appendix D

42 U.S.C. § 1973

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Appendix E

42 U.S.C. § 1973c

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for

failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Appendix F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ANGEL DIAZ, DENISE L. MOTLEY, and REYNALDO COHOLO,	95 Civ. 2591 (DGT, JMM, SJ)
Plaintiffs,	AFFIDAVIT
– against –	
SHELDON SILVER, et al.,	
Defendants.	

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

RALPH MARINO, being duly sworn, deposes and says:

1. I am a former State Senator and the former State Senate Majority Leader and President Pro Tem of the New York State Senate. I served as Majority Leader and President Pro Tem in 1992 and have personal knowledge of the facts surrounding the State Legislature's enactment of the reapportionment plan incorporated into the judgment issued by the state court in *Reid v. Marino*. Indeed, as Majority Leader and President Pro Tem, I was intimately involved in all aspects of the reapportionment process that ultimately led to a legislative impasse, the resulting state and federal litigations and the ultimate passage of the reapportionment plan by the Legislature.

2. The Republican majority in the Senate believed the districting plan proposed by Special Master Lacey in the federal court action *PRLDEF v. Gantt* would have a negative impact upon the political interests of our party, including our interest in protecting incumbents.

3. We were advised by our attorneys that it appeared to be likely that the *PRLDEF* court would order implementation of the Lacey plan if the Legislature did not act. We were thereafter advised by our attorneys that the state court had issued a judgment binding upon us.

4. Faced with the choice of doing nothing and having the federal court impose the Lacey plan or enacting the plan incorporated in the state court judgment, the Senate majority determined to enact the state court plan.

5. Our determination to enact the state court plan was primarily for political reasons, including protecting incumbents.

/s/ Ralph Marino
Ralph Marino

Sworn to before me this
27th day of June, 1996

/s/ Barbara Greenhut
Notary Public

BARBARA GREENHUT
NOTARY PUBLIC, State of New York
No. 30-4660833
Qualified in Nassau County
Commission Expires 12/31/97

Appendix G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ANGEL DIAZ, DENISE L. MOTLEY, and REYNALDO COHOLO,	95 Civ. 2591 (DGT, JMM, SJ)
Plaintiffs,	AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT
– against –	
SHELDON SILVER, et al.,	
Defendants.	

STATE OF MARYLAND)
) ss.:
COUNTY OF MONTGOMERY)

BENJAMIN CHEVAT, being duly sworn, deposes and says:

1. I was Chief Counsel and Chief of Staff to the Hon. Saul Weprin, the late Speaker of the New York State Assembly in 1992. As the Speaker's Chief Counsel and Chief of Staff, I was personally involved in the negotiations and debates concerning the passage by the New York State Legislature of the redistricting plan incorporated in the *Reid* judgment. I therefore have personal knowledge of the motivation of the Speaker and of the State Assembly in their determination to enact the redistricting plan into law.*

2. The Assembly had a strong interest in protecting the seats of the incumbent Democratic members of New York's Congressional delegation.

---

* I am making this affidavit setting forth the motivation of the Speaker and the Assembly, because Speaker Weprin has sadly passed away.

3. Although the Assembly had pressed the *Reid* court to adopt an overall plan different from the one ultimately proposed by the Referees and ordered by the state court, the redistricting plan incorporated into the state court judgment did not do violence to the Assembly's strong interest in protecting incumbency.

4 By contrast, in the opinion of Speaker Weprin and the Assembly majority, the plan crafted by Special Master Lacey in the federal court action entitled *Puerto Rican Legal Defense and Education Fund Inc. ("PRLDEF") v. Gantt*, was completely destructive of incumbency and, in our opinion, would have caused the defeat of many Democratic incumbents and resulted in the loss of their influence and power based upon their seniority in Congress.

5. On June 3, 1992, the *PRLDEF* court indicated that it would impose the Lacey plan unless the State Legislature enacted a plan by June 10, 1992. On June 8, 1992 the state court entered its binding judgment incorporating the Referees' plan. Therefore, the Speaker determined that the Assembly must enact the plan incorporated in the *Reid* judgment prior to June 10, 1992 to avoid the threat to incumbency posed by the Lacey plan. The Speaker's decision led to the Assembly's passage on June 9, 1992 of the plan incorporated in the *Reid* judgment.

6. Accordingly, the primary and overwhelming motivation of the Assembly in passing the redistricting plan incorporated in the *Reid* judgment was to protect Congressional incumbency by acting to prevent the Lacey plan from being ordered by the *PRLDEF* court.

/s/ Benjamin Chevat
Benjamin Chevat

Sworn to before me this
26th day of July, 1996

/s/ Terrence J. McAndrew
Notary Public

TERRENCE J. McANDREW
Notary Public
District of Columbia
My Commission Expires February 28, 2000

Supreme Court, U.S.
FILED
JUL 9 1997
OFFICE OF THE CLERK

No. 96-1680

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

SHELDON SILVER, *et al.*,

Appellants,

vs.

ANGEL DIAZ, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether the district court correctly determined, on the record before it, that there was no triable issue of material fact as to whether the intent to segregate voters by race was the predominant intent behind the creation of New York's Twelfth Congressional District.

2. Whether the district court properly found that the defendants had not met their burden of producing evidence showing that the creation of the Twelfth Congressional District was necessary to comply with Section 2 of the Voting Rights Act.

3. Whether the district court properly found that the defendants had not met their burden of producing evidence showing that the design of the Twelfth Congressional District was narrowly tailored to remedy any potential liability under Section 2 of the Voting Rights Act.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States District Court were:

1. Angel Diaz, Reynaldo Coholo and Denise Motley, plaintiffs and appellees herein.

2. Sheldon Silver, in his offical capacity as Speaker of the House for the Assembly of the State of New York, defendant and appellant herein.

3. Congresswoman Nydia Velazquez, Congressman Major R. Owens, Marshall Dubin, Asquith Reid, Evy Papillon-Just, William Abrams, Annella C. Johnson, defendant-intervenors and appellants herein.

4. Luis Garden Acosta and Margarita Lopez, defendant-intervenors and appellants herein.

5. Peter Lau and John Kuo Wei Tchen, defendant-intervenors and appellants herein.

6. George E. Pataki, in his offical capacity as Governor of the State of New York, Joseph L. Bruno, in his offical capacity as President Pro Tem and Majority Leader of the Senate of the State of New York, the Board of Elections of the State of New York and Owen T. Smith, Evelyn J. Aquila, and Helena M. Donohue in their official capacities as Commissioners of the Board of Elections of the State of New York, defendants.

7. Congresswoman Carolyn B. Maloney, defendant-intervenor.

8. Delco L. Cornett, plaintiff-intervenor.

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MOTION TO AFFIRM

Appellees, pursuant to Rule 18.6 of the Rules of the Supreme Court of the United States, respectfully urge that the Court affirm the judgment below permanently enjoining further use of the current configuration of New York State's 12th Congressional District (the "12th CD") on the ground that it is intended to segregate voters by race, in violation of the Equal Protection Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

This case is about New York's bizarrely configured 12th CD, a tri-county, 813-sided monstrosity, which was designed to include within it a majority of Hispanic voters, and to exclude voters of other races. Plaintiffs are three citizens who reside in the 12th CD, and thereby have standing to bring this action. *See United States v. Hays*, 115 S. Ct. 2431 (1995).

A. Background to the Enactment of New York's Congressional District Plan

The 1990 decennial census established that New York State had not grown in population as fast as other states, and that New York's congressional delegation to the House of Representatives would have to be reduced from 34 to 31 members.

In March of 1991, with electoral deadlines approaching, the Legislature had not enacted a congressional district plan. In response to the growing crisis caused by the Legislature's failure to act, a lawsuit, *Reid v. Marino*, No. 9567-92, was filed in the New York Supreme Court of Kings County, to compel the development of a satisfactory district plan. That court appointed a panel of three referees to draft a plan.

At the same time, a federal action, *PRLDEF v. Gantt*, No. CV-92-1521 (SJ) was filed in the U.S. District Court for the

Eastern District of New York. The *PRLDEF* court appointed a special master and instructed him to develop a district plan.

Both houses of the New York Legislature and the Governor were named defendants in each of these actions, which proceeded concurrently. Representatives of each house of the legislature actively participated in hearings before both courts. Each house of the Legislature submitted proposed district plans, both to the state court referees and to the federal special master.

The special master developed a plan and filed it with the federal court on May 26, 1992. On June 4, the referees made a formal report to the state judge recommending the adoption of the plan they had developed. Thereafter, on June 8, 1992, the referees' plan was adopted as law by order of the state court.

On June 9, 1992, the state referees' plan was enacted into law by the Legislature, and it was signed by the Governor a few days later. The new plan -- along with the referees' report explaining it -- was sent to the Department of Justice as part of the State's effort to obtain pre-clearance under section 5 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973c. The district plan subsequently was pre-cleared by the Justice Department, and became state law.

B. The Proceedings Below

Plaintiffs commenced this action in June 1995, alleging that the 12th CD unconstitutionally segregated voters by race. A three-judge panel was designated to hear this action pursuant to 28 U.S.C. § 2284 in December, 1995.

The parties below had ample opportunity to present evidence to the district court. Silver submitted a motion to dismiss on November 7, 1995, on the basis of *res judicata* and other fact-based grounds, and presented a over a thousand pages of evidence in support of his motion. Plaintiffs moved for

a preliminary injunction on April 2, 1996, and the parties submitted thousands more pages of evidence in support and in opposition to that motion. A hearing on the motion for a preliminary injunction was held on July 1, 1996. All parties attended this hearing. The motion subsequently was denied on the grounds that it would have been too disruptive to the State's electoral process. *See Diaz v. Silver*, 932 F. Supp. 462 (E.D.N.Y. 1996).

On July 22, 1996, plaintiffs moved for summary judgment. Appellants Luis Garden Acosta and Margarita Lopez (the "Lopez Intervenors") cross-moved for summary judgment.[1]

On February 26, 1997, the three-judge district court unanimously granted plaintiffs' motion for summary judgment, denied the Lopez Intervenors' cross-motion for summary judgment, and denied Silver's motion to dismiss. This decision is annexed by Silver to his appendix ("Silver App."), at A-1. This appeal followed.

GROUNDS FOR AFFIRMANCE

Appellants' argument here, stripped to its essence, is that the district court improperly applied the settled law of summary judgment. In fact, the district court's decision was an appropriate response to the strongest case alleging a *Shaw*-type claim of racial gerrymandering that ever has been filed.

Appellants have identified no novel or substantial issues of law in this appeal. They point to no split between U.S. courts of appeal -- or between the district courts of two circuits, or between a federal court and a state court of last resort -- on any

---

[1]Both Silver and the Lopez Intervenors point out that no hearing was held on the summary judgment motion, as if to imply that the district court acted precipitously, but the fact is that neither they nor any other party requested a hearing on that motion.

legal principle or issue.

To the contrary, the district court's decision below turned, above all, on a singular failure of defendants' evidence. As a result, a review by this Court would be pointless. An examination of the salient features of the evidentiary record shows the overwhelming, and essentially unchallenged, character of the plaintiffs' case.

I. PROOF OF THE PREDOMINANCE OF RACIAL CONCERNS IS OVERWHELMING

"A racially gerrymandered districting scheme, like all laws that classify citizens on the basis of race, is constitutionally suspect." *Shaw v. Hunt*, 116 S. Ct. 1894, 1900 (1996). In a case alleging racial gerrymandering, the plaintiff must show "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson*, 115 S. Ct. 2475, 2488 (1995). To show that race was the predominant factor, "a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles" to racial considerations. *Id.*

If race predominated in the drawing of districts, the district plan "cannot be upheld unless it satisfies strict scrutiny, our most rigorous and exacting standard of constitutional review." *Id.*, at 2490. At this point, the burden shifts to the defendant to prove "that its districting legislation is narrowly tailored to achieve a compelling interest." *Id.*

Appellees' undisputed evidence below included the point-blank admissions of those who drew the 12th CD that it was intended to segregate voters by race, which admissions were adopted by the State of New York; the shape and demographics of the 12th CD; admissions in the legislative record; and the content of alternative district plans proposed by the New York

Legislature.

A. The Referees' Admissions in the Referees' Report

In the Final Report of the Referees, dated June 4, 1992 (reprinted in Lopez Intervenors' Appendix ("Lopez App."), at A-51, without appendices) (the "Referees' Report"), the referees first revealed the district plan that includes the 12th CD. The Referees' Report was made contemporaneously with the district plan, by the very individuals who designed it. The Referees' Report sets forth the referees' factual findings and interpretations of law, and describes the precise methodology they used in configuring New York's congressional districts. *See* Silver App., at A-12.

In a word, the Referees' Report reveals that the referees were obsessed with the issue of race. The report refers to little else, either when it compares proposed district plans, or when it discusses the referees' own plan, which the referees concede to have created seven "minority" districts. *E.g.*, Lopez App., at A-105 - A-112; A-115 - A-124; A-128 - A-148; A-150 - A-156. As the district court correctly observed, "the referees provided a compendium of the racial composition of the minority districts," such that "[f]or each district, the only characteristic analyzed was voters' race." Silver App., at A-15.[2]

Apart from the general tenor of the Referees' Report, there are particular, critical admissions that prove the intent to segregate voters by race. Foremost among these admissions is

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[2]This emphasis reflects the fact that the referees unquestionably interpreted the VRA to *require* the construction of as many race-based districts as possible. As they admitted, in "each jurisdiction covered" under the VRA, "the maximum number of districts which achieve 'effective minority voting equality' have been created." Lopez App., at A-54.

the referees' express statement of their districting priorities. They stated that all plans were analyzed in the context of three groups of criteria: first, the one person, one vote standard; second, race-related factors; and third, a loosely connected group of all other criteria -- what they called "[p]ublic interest criteria including contiguity, compactness, traditional boundaries in the State, communities of interest, and political fairness." Lopez App., at A-78. The referees designated the first two as more important "primary criteria." "Federal law mandates that congressional districting plans must meet two primary requirements: the one person, one vote standard and the racial fairness standard." *Id.*, at A-82. The rest are described as "secondary criteria," which "may" be considered. *Id.*, at A-96.

The district court was correct to emphasize that "the significance of the referees' repeated statements in their report that they considered 'traditional criteria' only after considering race cannot be overstated." Silver App., at A-55. All of the traditional, race-neutral criteria -- and the ones they list are identical to the traditional districting criteria listed in *Miller*, *supra*, 115 S. Ct. at 2488 -- are denigrated as "secondary." In the words of *Miller*, these criteria are "subordinated" to "racial considerations." *Id.*[3]

Moreover, it is clear from the Referees' Report that this order of priorities successfully was executed. The referees stated that their districting method involved "obtain[ing] estimated voter registration data by race." Lopez App., at A-114. In a stunning series of admissions, the referees describe

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[3]Significantly, the referees *did* apply these criteria when race was *not* at issue. They state that, "in drafting the upstate counties," which contained no majority-minority districts, "we focused on honoring traditional boundaries, compactness, political fairness and communities of interest." *Id.*, at A-112 - A-113.

how this racial data was processed with the help of a race-conscious computer program:

> Based upon the Board of Elections registration list, using surname dictionaries to identify Hispanic and non-Hispanic Asians, and then census-based estimates to identify non-Hispanic blacks and whites, an estimate of registration by race for New York City was developed. This was loaded on the REAPS [computer] System. Using REAPS, the referees not only were able to see how various minority districts (and the various racial and language groups within the same district) compared at the total population and voting age population levels, but also at the estimated registered voter level.

Id., at A-113 n.32. In a word, the referees constructed "various minority districts" to see which ones supplied the racial characteristics they wanted. This is, on its face, an "effort to segregate the races for purposes of voting," which is proscribed by the equal protection clause. *Shaw v. Reno*, 509 U.S. 630, 642 (1993).

With respect to the 12th CD in particular, the referees provided another critical concession by freely admitting their extraordinary efforts to create a race-based district. In their words, "our Plan includes a newly created tri-county *Hispanic district* which, *although not 'aesthetically' compact*, was *drawn in a manner to ensure an effective concentration of Hispanic voters* that can elect a candidate of their choice." Lopez App., at A-99 - A-100 (emphasis added).

Appendices attached to the Referees' Report set forth the racial demographics of the 12th CD. *See* Racial Breakdown District 12 (headings specify *only* the race of the voters); "CONGRESS Plan State Racial Breakdown"; District Report - Registered Voters (political and racial breakdown of seven

minority districts). Appendix ("Diaz App."), at 7a, 8a.

Appellants do not dispute that the Referees' Report accurately describes the referees' methods, priorities, and motives, nor do they question its account of the 12th CD's racial demographics. The district court correctly concluded that there was "overwhelming evidence that race served as the predominant factor in the referees' creation of the 12th CD." Silver App., at A-50.

B. The Testimony of Dr. Gartner

The Referees' Report identified three expert consultants who were retained by the referees. The first was "Dr. Alan Gartner, Director of Research for the Graduate School and University Center, The City University of New York" ("Gartner"); the other two were Professor Michael Petreides of The College of Staten Island, and Professor Wendy Brown of Tulane Law School. Lopez App., at A-58.

Gartner testified on at least two occasions, on June 2 and June 5, 1992, in hearings before New York Supreme Court Justice James H. Shaw, Jr. Diaz App., at 9a, 25a. Gartner's testimony confirms in every respect the statements contained in the Referees' Report that New York's congressional districts were designed to segregate voters on the basis of race. As with the Referees' Report, the whole tenor of Gartner's testimony reveals his single-minded focus on issues of race. Appellees wish to draw the Court's attention to but a few of many telling admissions.

In the June 2, 1992, hearing, Gartner confirmed the priorities of the referees, stating that

> [t]he instructions of the Judge to the referees, and therefore, their instructions to us [were] to honor, in order, [first] the criteria of the federal Constitution: one person, one vote; [second] the Constitutional

> amendments and the Voting Rights Act that concerns so-called "minority districts"; and then, third, those other factors appropriate for districting.

Id., at 11a. In his testimony three days later, Gartner reiterated these priorities. "Criterion number one was . . . one person, one vote. Only when we had met that . . . then we turned to the Voting Rights Act standard. Only when we met that did we turn to other criteria." *Id.*, at 25a. Again, racial concerns were placed ahead of all other districting criteria save equal population. "There was no sacrifice of criterion two [creating racial districts, ostensibly to comply with the VRA] in order to meet criterion three [all other criteria]." *Id.*

Gartner provided a detailed explanation as to how he used a race-conscious computer program to construct districts. He stated that he used a computer to "translate Census numbers into geography," in order to produce "a set of maps that show concentrations of the three so-called 'protected [racial] classes.'" Diaz App., at 12a. These groups were "'Non-Hispanic blacks, non-Hispanic Asians,' and 'Hispanics.'" *Id.* In Gartner's view, "those concentrations tell you how to do the districting, per the Voting Rights Act." *Id.* He confessed that his description of the district plan "reflects our using those [racial] concentrations as the basis." *Id.*

Elsewhere, Gartner admitted that his computer was programmed to make it easy to identify racial concentrations: "The richer the shade (indicating) -- there's a code here (indicating) -- the more intensive the [racial] population group." *Id.*, at 29a. Gartner testified that districts were drawn to correspond to these racial concentrations. "[W]hat we have done is, we have overlaid with these black lines (indicating) the districts we drew for the seven so-called 'minority districts.'" *Id.*

With respect to the 12th CD in particular, Gartner stated that, "looking at the [racial] concentration maps, one sees . . .

that there is a potential, *if you're not bound by antiquated notions of compactness*, for an additional Hispanic seat. . . . this is District 12, [the] so-called 'Tri-county Seat.'" *Id.*, at 19a (emphasis added). Gartner then described how he used the racial "concentration maps" to identify "a band of Hispanics" stretching "across Northern Brooklyn . . . into Queens." *Id.* Ignoring the East River, Gartner followed this band of Hispanics into "Manhattan, into the Lower East Side"; into "Sunset Park and a little bit in Red Hook," and then added "a scattering of Hispanics, those Northern Queens Hispanics that I talked about." *Id.* Gartner concluded that "what we did, as everybody did, is we drew a district that basically looked like this (indicating), with the three legs." *Id.*

Elsewhere, Gartner carefully correlated every twist and turn of the 12th CD with the desire to segregate voters by race:

> Why do we drive down here (indicating)? *The population concentration of Hispanics [and] Asians, tells you to drive down that far* . . . Why this strange and peculiar configuration up here (indicating), of 12, as it wanders around? *We seek to mimic the Hispanic concentrations up here (indicating), and the same thing in the band across Northern Brooklyn.* . . . [T]here is a white population, the so-called Grand Street Houses, here (indicating), which *we brought out of that district for the purpose of trying to keep as high as possible the Hispanic and Asian population in District 12.*

Id. (emphasis added). It is hard to imagine a clearer depiction of the ugly business of race-based districting.

Appellants do not dispute that Gartner's testimony accurately describes the manner in which New York State's congressional districts, including the 12th CD, were constructed. Professor Gartner's testimony amounts to a clinic

in how to segregate voters on the basis of race. His candid and specific statements prove that New York's 12th CD was racially motivated to the exclusion of other districting criteria. His comments also provide a context for the aforementioned Referees' Report, and confirm the admissions it contains.

C. Evidence of the Subordination of Traditional Districting Criteria

Wholly apart from the admissions of the referees' and Gartner, the subordination of traditional districting criteria is established by undisputed evidence regarding the 12th CD's shape.

The 12th CD is one of the most bizarrely shaped in the nation. Known as the "Bullwinkle" district because of its unusual contours, the 12th CD has 813 sides, and invades three counties (Queens, Kings, and New York), crossing the East River to do so. The district court observed that, "[n]ot only does the district curve and weave among street blocks, at points it is connected purely by parks and highways, such as the Brooklyn-Queens Expressway." *See* Silver App., at A-46 and appendix A (map).

The district court had before it two studies of district compactness. The first, employing two measures of compactness commonly used by political scientists, listed New York's 12th CD as either the least-compact or second least-compact congressional district in New York, and from the sixth to the tenth lowest scoring district in the nation. Pildes & Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after* Shaw v. Reno, 92 Mich. L. Rev. 483, 565 (1993). The Lopez Intervenors introduced a second study, by David C. Huckabee, entitled *Congressional Districts: Objectively Evaluating Shapes, CRS Report for Congress*, Congressional Research Service (1996). Plaintiffs conceded this article to be

authoritative and adopted its conclusions. The article confirmed that the 12th CD has the either the lowest or second lowest compactness score in New York; and that it ranks either 427th or 428th in the nation, out of 434 districts. *See* Silver App., at A-38 - A-39.

D. Evidence Establishing the Legislature's Intent in Passing the Referees' Plan.

1. Adoption of the Referees' Report and Gartner's Testimony in New York's Section 5 Submission

It is beyond dispute that representatives of the New York Legislature used the Referees' Report to explain New York's congressional district plan to the United States Department of Justice.

Section 5 of the VRA requires "the chief legal officer or other appropriate official" of a state to submit to the U.S. Attorney General any change in voting procedures in a "covered" jurisdiction. Bronx, Kings, and New York Counties are covered jurisdictions, so any change in their congressional district lines must be submitted for pre-clearance.

The Department of Justice has adopted regulations implementing § 5 of the VRA. 28 C.F.R. Chap. 1, Part 51. The required contents of a § 5 submission are specified in 28 C.F.R. § 51.27. Paragraphs (a) and (b) of that section call for copies of the existing law and any proposed changes. Paragraph (c) calls for

> a clear statement of the change *explaining the difference between the submitted change and the prior law or practice*, or *explanatory materials adequate to disclose to the Attorney General the difference* between the prior and proposed situation with respect to voting.

(Emphasis added.) Failure to include this information has been held to render a § 5 submission incomplete. *See East Flatbush Election Comm. v. Cuomo*, 643 F. Supp. 260, 265 (E.D.N.Y. 1986) (in absence of explanatory information demanded under identical provision, plan was "not considered to have been presented for submission" to the Justice Department).

The letter introducing New York's section 5 submission, dated June 16, 1992, was signed by Senator Dean G. Skelos, "[o]n behalf of the Senate," and Assemblyman David F. Gantt, "[o]n behalf of the Assembly." Diaz App., at 2a. In the table of contents following that letter, under "II. Analysis of Change to Previous Law," the first item listed is the Referees' Report. *Id.*, at 3a. Significantly, the "State Court Transcripts" are listed as an appendix to that report. *Id.* This shows that Gartner's statements were also to be included as part of the State's "explanation" of its congressional district plan.

In the portion of the submission expressly referring to 28 C.F.R. § 51.27(c), it is stated that

> *The Report of the Referees to Justice Shaw explains in detail the background leading up to the development of this plan by the State Supreme Court. . . . This law, incorporating the state court plan, is being submitted for preclearance. The Report of the Referees follows.*

Id. (emphasis added).

In short, the submission makes it crystal clear that Referees' Report had been included to satisfy the requirements of 28 C.F.R. § 51.27(c), which calls for material "explaining" the proposed law. The district court rightly observed that, "[u]nder the circumstances, where this is the *only* document used to justify the Legislature's action, this submission binds the Legislature as an adoptive admission." Silver App., at A-50 (emphasis added).

The district court concluded that, "by attaching the referees' report to their Department of Justice pre-clearance submission, the Legislature affirmatively adopted the race-based methodology and rationale the referees used to create the plan." *Id.* The district court's reasoning is wholly consistent with the decisions of this Court, which uniformly stress the probative value of the contents a state's section 5 submission. *E.g.*, *Shaw v. Hunt*, *supra*, 116 S. Ct. at 1900; *Bush v. Vera*, 116 S. Ct. 1941, 1952; *Miller*, *supra*, 115 S. Ct. at 2489. Thus, "the referees' and their experts' statements are admissions here," Silver App., at A-52, and those admissions establish beyond any argument that New York's congressional districts were meant to segregate voters by race.

Appellants can give nor reason for questioning the district court's well-considered conclusion. Silver describes the Legislature's actions in appending the report to its section 5 statement as the "mere submission of racial data." Silver Jurisdictional Statement ("J.S."), at 16, 17. This innocent-sounding description ignores the fact that the Legislature provided the Referees' Report, and no other document, in *explanation* of its congressional district plan, in a part of its section 5 submission requiring such an explanation. Silver also argues that, by submission of the report, "the legislature simply was addressing the requirements of governing federal regulations." *Id.*, at 17. This is true but irrelevant: the fact that the State had to make a report to the Justice Department does not lessen the State's responsibility for what it chooses to submit.

The Lopez Intervenors contend that the section 5 submission makes no statement regarding "the Legislature's motive in adopting New York's Congressional plan." Lopez Intervenor's Jurisdictional Statement ("Lopez J.S."), at 14. This is nonsense. The section 5 submission *refers* to the Referees Report, in a section claiming to provide documents "explaining"

the submitted change. The Legislature's motivation is established by the act of appending the Referees' Report to its submission in explanation of the State's plan. "By using the referees' report, the Legislature authorized the referees to speak for it with regard to the methodology and development of the redistricting plan." Silver App., at A-51.

2. Other Evidence of the New York Legislature's Intent

The district court's finding that the New York Legislature adopted the Referees' Report decisively establishes the Legislature's intent to segregate voters by race. But the district court carefully evaluated a wealth of other undisputed evidence proving this intent.[4]

Most obviously, the shape of the 12th CD, especially when combined with the undisputed evidence of its demographics, establishes that it was intended to accomplish racial segregation. The district court noted that shape "alone may demonstrate that race was the dominant factor" in a district's creation. Silver App., at A-45; *see Miller*, *supra*, 115 S. Ct. at 2486 ("Shape is relevant . . . because it may be persuasive circumstantial evidence that race for its own sake" predominated over other concerns). "In every redistricting case since *Shaw v. Reno*,"

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[4]Although the strong evidence in this case renders the issue moot, appellees note that it is questionable whether a legislature ever can simply disavow responsibility for the contents of a bill that *it has passed*. The district court noted that, under this Court's Fourteenth Amendment jurisprudence, even if the Legislature is wholly innocent of discriminatory intent, it "may be held liable for the referees' intent since a state actor may be charged with otherwise private discrimination by seeking to enforce it." Silver App., at A-52, *citing Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177-79 (1972); *Shelley v. Kraemer*, 334 U.S. 1, 17-20 (1948). *See also* the discussion *infra* (intent of a bill can be determined from its contents).

district compactness has been "to determine whether the shape of the district was based on racial considerations." Silver App., at A-45 - A-46; *citing Bush*, *supra*, 116 S. Ct. at 1952; *Shaw v. Hunt*, *supra*, 116 S. Ct. at 1901; *Miller*, *supra*, 115 S. Ct. At 2489-90. In the view of the district court, "the racial intent embodied in the redistricting plan . . . is apparent on the face of the statute passed by the Legislature." *Id.*

The district court also cited numerous references in the legislative record to the racial purpose embodied in New York's congressional district plan. Silver App., at A-22 - A-33. These often occurred in the context of a complaint that even more Hispanic districts should have been created. *Id.*, at A-25, A-26, A-33 (comments of the Governor); *see also* Diaz App., at 39a (Assemblyman Gantt introducing the plan in the Assembly by claiming that "[t]he maximum number of majority minority votirg rights districts were created to ensure compliance with the Voting Rights Act").

Another powerful basis for establishing the Legislature's intent to create a race-based Hispanic district is the undisputed evidence, duly noted by the district court, that "members of both houses of the Legislature submitted to the referees and special master versions of a redistricting plan that included a 'tri-county Hispanic district' similar to the 12th CD." Silver App., at A-48. *See* Referees' Report, Lopez App., at A-100 n.22 ("All the proposed plans submitted [to the referees] and to [federal] special master Lacey include a similar tri-county Hispanic district); at A-139 (Assembly plan "also provides for one tri-county [minority] district"); A-145 (Senate plan's "[d]istrict 12 is an Hispanic majority 'tri-county' district"); Affidavit of Theodore S. Arrington, Lopez App., at A-258 ("The third Hispanic district in the [federal special] Master's plan is CD 10 [in] Brooklyn, Manhattan, and Queens. . . . The Senate and Assembly plans also create geographically dispersed districts in these areas."). Note that these proposed plans also

were appended to the State's section 5 submission to the Justice Department. Diaz App., at 3a ("Alternative Plans Submitted").

Finally, as the district court rightly noted, legislative representatives "verbally embraced the primacy of race in redistricting during a hearing held by the [federal] special master." Silver App., at A-48. In the May 18, 1992 hearing cited by the district court, Mr. Hedges, on behalf of the Assembly, and Mr. Carvin, on behalf of the Senate, spoke in grossly racial terms of the need to create a Hispanic district. *See* Diaz App., at 40a - 44a.

Thus, *even if the Legislature had not adopted the statements contained in the Referees' Report and in Gartner's testimony in its submission to the Justice Department*, the district court had an abundance of undisputed evidence showing that the New York Legislature's overriding concern in passing its district plan was to segregate voters by race. In their jurisdictional statements, appellants are silent about the district court's finding that racial intent was apparent on the face of the redistricting statute, as well as the critical fact that both houses of the New York Legislature submitted plans to the referees and the special master which contained similar tri-county "Hispanic" districts.

As the foregoing evidence establishes, Silver's portrayal of the district court's decision as turning on the defendants' mere "awareness" of the racial impact of the referees' plan is nonsense. Silver J.S., at 13 *passim*. Silver's highly selective quotations of the district court's few references to the Legislature's being "aware" of race do not reflect the tenor of the district court's opinion, or the range and quality of the undisputed evidence that it considered. Moreover, appellants' citation of *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979) is misplaced. In that case, a female applicant, who alleged that a state hiring policy that favored veterans was a

veiled method of favoring men, provided insufficient evidence that the state intended to discriminate. There is nothing veiled about the State's intent here. The 12th CD unquestionably was created and enacted "because of" its racial qualities. A simple application of the principles enunciated in *Feeney* supports the district court's decision.

II. ATTEMPTS TO DISTANCE THE LEGISLATURE FROM THE RACIAL INTENT EMBODIED IN ITS CONGRESSIONAL DISTRICT PLAN ARE LOGICALLY EXTREME AND FACTUALLY EMPTY

Faced with an imposing mass of undisputed evidence, appellant Silver brazenly asserts that the Legislature's "predominant motivation in enacting the plan containing the 12th Congressional District had *nothing to do with race*," but "everything to do" with protecting congressional incumbents. Silver J.S., at 7 (emphasis added).

Silver, joined by the Lopez Intervenors, notes that the *PRLDEF* district court had ordered the federal special master's plan to be imposed unless the New York Legislature enacted a congressional district plan by a particular deadline. The core of Silver's argument on appeal is that the *PRLDEF* court's deadline forced the Legislature to choose between the federal special master's plan and the referees' plan.[5] Silver claims that the state

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[5] Silver's exposition of the facts surrounding the Legislature's dilemma is flawed in that it depicts the Legislature's as more helpless than it was. First, Silver conveniently ignores the fact that it was the Legislature's own chronic failure to act that precipitated the electoral crisis and the two lawsuits. The Legislature could have passed its own district plan at any time before those cases were filed and, indeed, at any time before decisions in those cases were rendered. Second, even after the state court rendered its decision on June 8, 1992, the

referees' plan was more friendly to incumbents than the special master's plan. Therefore, Silver reasons, the enactment of the referees' plan was "motivated" by the intent to protect incumbents. *Id.*, at 7 *passim*; Silver App., at A-86 - A-89; Lopez J.S., at 13-16.

Silver's argument is a word game, dependent on the double meaning that can be ascribed to words like "motive," "purpose," and "intent." The "intent" or "purpose" of legislation is always determined in the first instance by its facially evident content. *See, e.g., U.S. v. Ron Pair*, 489 U.S. 235, 242 (1989) (ordinarily, the "plain meaning of legislation should be conclusive"); *Norfolk & Western v. Am. Train Dispatchers*, 499 U.S. 117, 129 (1991) ("If the intent of [the legislature] is clear, that is the end of the matter"). For example, a bill that authorizes highway construction is "intended" to authorize highway construction; and a bill that bans narcotics is "intended" to ban narcotics.

In the same way, where districts are distorted in a manner that carefully includes and excludes members of particular races, they clearly were *intended* to perform this function. As with any other bill, the intent of a redistricting bill may be inferred from its contents. As the district court found below, "the Legislature should be held accountable for the racial intent embodied in the redistricting plan because such intent is apparent on the face of the statute passed by the Legislature."

Legislature could have pursued legal options, including (1) state appellate court review of the state court's decision, (2) collateral federal review of the state court decision, or (3) appellate federal review of the federal court's "ultimatum" of June 3, 1992. Finally, the Legislature could have chosen to pass its own plan even after June 10, and taken the reasonable legal position that its conduct rendered the state and federal rulings moot. Instead, the referees' plan was debated, passed, and sent to the Governor.

Silver App., at A-52; *see Miller*, *supra*, 115 S. Ct. at 2488-9 ("evidence of a district's shape and demographics" may prove "that race was the predominant factor motivating the legislature's decision"; finding that "it was 'exceedingly obvious' from the shape of the Eleventh District, together with the relevant racial demographics" that it was racially motivated); *Bush*, *supra*, 116 S. Ct. at 1959 (rejecting a claim that districts were drawn to protect incumbents where "the district lines correlate almost perfectly with race.").

Given the bill's content, all of Silver's arguments concerning the political circumstances surrounding the districting bill's passage are irrelevant. Put another way, appellees could *concede* that the districting bill was passed to avoid the harm to incumbents perceived to exist in the federal master's plan. That has nothing to do with the undisputed evidence showing that the 12th CD was carefully designed to encircle Hispanic voters. To raise a triable issue of material fact regarding the primacy of "incumbent protection," appellants must show that the *12th CD* was designed as part of an effort to protect incumbents. Appellants failed even to attempt this showing.[6]

The district court acknowledged that "incumbency explains, in major part, the final boundaries of various districts," but concluded that, "without the factor of race, the 12th CD, as a majority-Latino district, would never have been created." Silver App., at A-57. The district court made the irrefutable point that if incumbency protection truly had been more important than race in the design of the 12th CD, then a "different district, to protect another incumbent, would have been the politically-desirable choice." *Id.*

This underscores the larger point that appellants' claim that

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[6]Note that, in any event, the 12th CD was a "newly created" district which contained no incumbent. *E.g.*, Lopez App., at A-99.

the desire to protect incumbents was predominant is factually empty. The defendants simply failed to present any evidence suggesting that incumbency was more important than the perceived need to draw racially segregated districts, and, in particular, the 12th CD.

The only evidence Silver offered was a series of contemporaneous newspaper articles, and two very brief affidavits, one by Ralph Marino, former Senate Majority Leader of the New York Senate, and one by Benjamin Chevat, who was counsel to former Speaker of the Assembly, the late Saul Weprin. Silver J.S., at 10-12; Silver App., at A-86 - A-89. These articles and affidavits make general statements to the effect that the state referees' plan was perceived to have less impact on incumbents than the federal special master's plan, and that it was preferred for that reason. *Not one of these articles or affidavits even mentions the 12th CD*, let alone disputes that it was constructed to segregate voters by race.[7]

It is hard to fathom what other evidence appellants would present on the issue of the Legislature's intent if given the opportunity to do so. The district court remarked that "none of the defendants has offered, in their affidavits or memoranda, any description of the evidence that they would present at a trial to contradict" the conclusion that "incumbency was always

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[7]Appellees also note that Silver inconsistently offers the statement of a legislator and a legislator's counsel, while arguing at the same time that "[i]n New York State, statements of individual legislators have no probative value in ascertaining legislative motivation." Silver J.S., at 19. Sensing the contradiction, Silver adds that "[i]t is an accepted tenet of political reality in New York" that "all substantive legislative decisions . . . are made solely by two people," the Senate Majority Leader and the Speaker of the Assembly. This dubious proposition is discussed *nowhere* in the record below. Silver is impermissibly trying to make his record now.

subordinated to race." Silver App., at A-52. The mystery remains on appeal.

Silver has belittled the competence of individual legislators to testify as to legislative intent, so presumably he would not offer such testimony.. Silver J.S., at 19. The only statement made by either appellant regarding a future proffer of evidence on this issue is a single paragraph in which Silver claims he would "demonstrate" by way of an "historical background" that "plaintiffs failed to sustain their burden" of showing that race predominated. Silver J.S., at 24. As an example of pure bureaucrat-ese, this paragraph is a masterpiece. It is non-specific and utterly confusing, filling space on the page without managing to say anything. The fact is that both appellants and appellees know that a trial would be a waste of time.

III. THE UNDISPUTED EVIDENCE CLEARLY SHOWS THAT THE 12TH CD VIOLATED NEW YORK'S TRADITION OF DISTRICT COMPACTNESS

Focussing on this Court's statements that a *Shaw*-type claim arises where "traditional districting criteria" are subordinated to race, the Lopez Intervenors argue that the 12th CD is not so irregularly shaped as to fall outside New York's traditional districting criteria. As part of this argument, New York is alleged to have extraordinarily non-compact districts. Lopez J.S., at 17, *passim*.

As with other arguments pressed on appeal, this argument fails first as a matter of fact. To show New York's allegedly non-compact districting tradition, the Lopez Intervenors rely entirely upon a narrative of New York districting. Lopez App., at A-21 *passim*. This narrative -- composed, not by historians, not by legislators, not by political scientists, not by law professors or other experts, but by the *lawyers* for the Lopez

Intervenors -- merely purports to identify 15 or so New York-area districts, from the period 1789 until 1990, that extended into three or more counties. The lawyers for the Lopez Intervenors engage in no quantitative compactness analysis. They discuss so few districts, relative to the entire history of New York, that they are as likely to have established the exceptions to a districting tradition as they are to have shown the districting tradition itself. There is no reference to changes in law or population, and no attempt to provide historical context. The district court agreed that "approximately fifteen districts out of thousands over the course of 180 years does not prove that compactness has not been a traditional criteria" -- and, indeed, that the historical narrative could be conceded without contravening plaintiffs' case. Silver App., at A-64.

The district court also correctly stated that "[c]ompactness is a traditional districting criterion under New York law," citing the state constitution. Silver App., at A-65, *passim*; *see Schneider v. Rockefeller*, 31 N.Y.2d 420, 430, 340 N.Y.S.2d 889, 897 (1972) (not true that "the constitutional requirements of compactness, contiguity and convenience lack vitality"; if the Legislature "plays fast and loose with these constitutional requirements, it risks having a districting plan set aside"); *Matter of Sherrill v. O'Brien*, 188 N.Y. 185, 210-11 (1907) (State Senate plan voided in part because the 13th district violated the Constitution's compactness requirement). Moreover, it is noteworthy that both the referees and counsel for the Assembly stressed the importance of compact districts. Lopez App., at A-78, A-98, A-113; Silver App., at A-64. The contrary, unsupported position is clearly maintained for the purposes of litigation.

Equally devastating to appellants' argument is the fact that "[t]he 12th CD simply is not compact, *even by New York standards*." Silver App., at A-71 (emphasis added). Regardless whether New York's district compactness scores were generally

low, the 12th CD is still either the worst- or second worst-scoring district in the State. *Id.* Furthermore, New York's range of compactness scores is comparable to those of Texas, Georgia, and North Carolina, where racial gerrymanders were struck down. *Id.*, at A-39. It is small wonder the district court concluded that the "argument that 'traditional criteria' under New York law do not require respect for compactness is not supported by the record." *Id.*, at A-64.

The factual record in this case simply does not raise the legal issues asserted by the Lopez Intervenors.[8] But if it did, appellees agree with the district court that the Lopez Intervenors' interpretation would allow states to eviscerate the holding of *Shaw* and its progeny by expediently redefining their "traditions." Silver App., at A-63. Further, lack of compactness is a universal sign that voters have been pulled into or pushed out of districts to facilitate racial gerrymandering. Regardless of a state's districting tradition, an evaluation of district compactness always will serve this valuable evidentiary function.

IV. THERE CAN BE NO *RES JUDICATA* BAR TO THIS ACTION BECAUSE THERE IS NO PRIVITY BETWEEN PARTIES TO THIS AND TO THE *REID* ACTION

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[8]The Lopez Intervenors make a passing (and very unclear) reference to the issue whether "communities of interest" were considered in drawing the 12th CD. Lopez J.S., at 27-8. The district court carefully reviewed powerful evidence, some of it offered by the defendants, showing that communities were destroyed, not created, by the 12th CD. Silver App., at A-59 - A-62. The Lopez Intervenors suggest no new evidence they would provide on this issue. Indeed, the crux of their argument seems to be that "extensive factual evidence is not necessary" on this point. Lopez J.S., at 27.

To be barred by the principle of *res judicata* from bringing a claim, privity must exist between the plaintiffs in the pending and in the prior action. *See Phillips v. Kidder, Peabody & Co.*, 750 F. Supp. 603, 606 (S.D.N.Y. 1990) (claim preclusion regarding parties who do not have a "sufficiently close" relationship to the original litigants would violate due process rights); *Green v. Santa Fe Indus., Inc.*, 70 N.Y.2d 244, 253, 519 N.Y.S.2d 793, 796 (1987); Restatement (Second) of Judgments § 41(1).

It is undisputed that none of the plaintiffs in this action were parties to *Reid*, or were members of any organization that was a party. Silver App., at A-40 n.13. No class ever was certified in *Reid*. Nevertheless, Silver argues that plaintiffs, two Hispanic men and an African-American woman, were represented in *Reid* solely because other Hispanics and African-Americans were parties to that action. Silver proposes a new form of race-based privity that is beyond the reach of any theory of privity that any federal or state court has recognized. In the words of the district court, Silver's argument "contains the same type of racial stereotyping condemned by the Supreme Court" in *Shaw* and other cases. *Id.*, at A-40 - A-41 n.13.

Silver's argument has other serious defects. The claims presented in *Reid* were the opposite of those presented here -- the complaint there sought the drawing of *additional* race-based districts. Further, *Reid* was decided prior to the major change in constitutional law occasioned by *Shaw v. Reno*. Finally, the identical assertion of race-based claim preclusion based on *Reid* was raised and rejected by another district court in *Torres v. Cuomo*, 92 Civ. 5811 (S.D.N.Y. 1993) (not available in F. Supp.), 1993 Lexis 1165, 1993 Westlaw 33639.[9] For the

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[9]Interestingly, it was the Puerto Rican Legal Defense and Education Fund -- attorneys for the Lopez Intervenors -- who represented the

reasons given by the district court below, *res judicata* does not apply here.

V. THE 12TH CD WAS NOT NARROWLY TAILORED

In order to make a threshold showing that section 2 of the VRA has been violated, a "minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

The district court rejected the notion that this criterion had been met, on the grounds that "[n]o one looking at a map of the 12th CD could reasonably suggest that the district contains a 'geographically compact' population of any race." Silver App., at A-71. Thus, the 12th CD was not narrowly tailored to achieve its purported goal of compliance with the VRA. The district court's holding in this regard was compelled by two recent decisions of this Court, which proscribed the use of bizarrely drawn districts to comply with the VRA. *Id.*, at A-69 - A-70, *citing Shaw v. Hunt*, *supra*, and *Bush*, *supra*.

The district court squarely held that the "12th CD simply is not compact, even by New York standards." Silver App., at A-71. The district then held, *in the alternative*, that section 2 compactness is not dependent on any particular state's compactness tradition. *Id.*, at A-72. It is this second, alternative decision that forms the basis for much of the Lopez Intervenors' claims to have identified a legal issue needing review. Lopez J.S., at 20-22. But even assuming that this second basis had been the district court's only basis, the legal argument pressed by the Lopez Intervenors is inapposite. The cases they cite obviously are addressing the issue whether strict

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plaintiff in *Torres* and defeated Silver's *res judicata* argument there.

scrutiny applies in the first place -- and not the question of narrow tailoring that was being considered by the district court.

Finally, the Lopez Intervenors argue that the State satisfies the test of strict scrutiny because it had a "strong basis in evidence" for assuming that section 2 of the VRA compelled the creation of the 12th CD. This argument is demonstrably wrong as a matter of law. Dealing squarely with this issue, this Court, in *Bush*, *supra*, stated that in the case before it

> [w]e assume, without deciding, that the State had a "strong basis in evidence" for finding the second and third threshold conditions for § 2 liability to be present. We have, however, already found that all three districts are bizarrely shaped and far from compact, and that those characteristics are predominantly attributable to gerrymandering that was racially motivated and/or achieved by the use of race as a proxy. . . . These characteristics defeat any claim that the districts are narrowly tailored to serve the State's interest in avoiding liability under § 2, because § 2 does not require a State to create, on predominantly racial lines, a district that is not "reasonably compact."

116 S. Ct. at 1961; *accord*, *Shaw v. Hunt*, *supra*, 116 S. Ct. at 1905.

CONCLUSION

For the foregoing reasons, appellees Diaz, Motley, and Coholo respectfully request that the Court affirm the district court's decision below.

Respectfully submitted,

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New York, New York 10021
(212) 832-9672

Counsel of Record for Appellees Angel Diaz, Denise L. Motley, and Reynaldo Coholo

July 9, 1997

Appendix A

SUBMISSION UNDER SECTION 5 OF THE VOTING RIGHTS ACT FOR PRECLEARANCE OF 1992 REDISTRICTING PLAN FOR NEW YORK STATE CONGRESSIONAL DISTRICTS

JUNE 16, 1992

LEGISLATIVE TASK FORCE
ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT
250 Broadway - 20th Floor
New York, New York 10007-2563
(212)417-4222
FAX (212) 417-3127

June 16, 1992

Chief
Voting Rights Section
Civil Rights Division
U.S. Department of Justice
P.O. Box 66128
Washington, D.C. 20035-6128

Dear Chief:

Submitted herewith for preclearance pursuant to Section 5 of the Voting Rights Act (42 U.S.C. 1973 c) is the Redistricting plan for New York State's Congressional Districts. Consistent with the strictures of Flateau v. Anderson, 537 F. Supp. 251 (S.D.N.Y. 1982), the proposed districts were promulgated on the basis of the 1990 decennial census.[1] See, 28 CFR 51.27(g)(h). They are intended for

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[1] The redistricting plan for the Congressional lines promulgated after the 1980 census were precleared in July 1982. 28 CFR 51.27(p): All Section 2 challenges to the 1980 plan were dismissed Flateau v. Anderson, supra; see I. Introduction, 2) Description of Litigation Concerning the Change or Related Voting Practices in New York State will be found in the legislature's submission regarding the Assembly and the Senate 28 CFR 51.27(o).

use in the next primary and general elections scheduled to be held on September 15, 1992 and November 3, 1992 respectively. See 28 CFR 51.27(j). The proposed districts will not be used, enforced or administered until they have been precleared. 28 CFR 51.27(k).

Analysis of changes to previous law (51.27(c)) for the Congress appears in Section II.

Given the complexities of redistricting in New York State, and given the large number of diverse minorities in New York State who are impacted by both Section 5 and Section 2 of the Voting Rights Act, we respectfully request that a decision on preclearance be issued on an expedited basis so as to avoid uncertainty in the elective process. See 28 CFR 51.34.

Respectfully Submitted,

On behalf of the Senate,	On behalf of the Assembly,
/s	s/
Senator Dean G. Skelos Co-Chairman	Assemblyman David F. Gantt Co-Chairman

New York State Legislative Task Force
on Demographic Research and Reapportionment

Submission under Section 5 of the Voting Rights Act for
Preclearance of 1992 Redistricting Plan for
New York State Congressional Districts

*** SEE LEGISLATIVE SUBMISSION**

Letter of Transmittal

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1) Compliance with Procedural Prerequisites

* 2) Description of Litigation Concerning the Change or Related Voting Practices in New York State (28 C.F.R. 51.27(o)

* 3) The Legislative Task Force on Demographic Research and Reapportionment

* 4) Names, Addresses an [sic] Telephone Numbers of Assembly and Senate Contact People

* 5) Appendix A - Data Base and Design

II. Analysis of Change to Previous Law

1) Report of the Referees to New York State Supreme Court Justice James Shaw

2) Appendix A - State Court Transcripts (To be submitted later)

3) Appendix B - Alternative Plans Submitted

4) Appendix C - Copy of New York (51.27(a))

   a) Exhibit 7 - Governor's Approval Message and Bill Jacket
   b) Legislative History Documentation (Partial)

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III. Demographic Information (51.28(a))

1) Population by Race and Spanish Origin - 1984 Congressional Districts - 1980 Population

2) Population by Race and Spanish Origin 1984 Congressional Districts - 1990 Population

3) Population by Race and Spanish Origin 1992 Congressional Districts - 1990 Population

IV. Maps (51.28(b)

1. Appendix - Congress

a) 1984 and 1992 Block Level Districts Maps

b) 1984 and 1992 Block Level District Maps Shaded by 1990 Census Data for Non-Hispanic Black, Non-Hispanic Asian and Hispanic

***V. Election Returns (51.28(d))**

1) Candidates
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1) Results
- a) New York State Assembly 1982-1990
- b) New York State Senate 1982-1990
- c) United States Congress 1982-1990
- d) Other

VI. Publicity and Participation (51. 28(f))

* 1) Overview
2) Task Force Public Meetings
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* 6) Meetings With Minority/Community Groups
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VII. Federal Court Plan

VIII. Availability of the Submission (51.28(g)) (To be submitted later

***IX. Minority Group Contacts (51.28(h))**

X. Computer Tapes

1) Appendix H
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-JUSTICE_FORMAT_AD.DAT
-JUSTICE_FORMAT_SD.DAT
-JUSTICE_SD_VTDBLOCK.LIST
_VTDBLOCK_DATA_DIST.DAT
2) Appendix I
-SECTION 5 VOTE DATA

I. Introduction

1) Compliance with Procedural Prerequisites

This Redistricting Plan for New York State's Congressional Districts is being submitted as soon as possible after it became final in compliance with 28 CFR Sec. 51.21. The Redistricting Plan became final on June 12, 1992 when legislation constituting the plan duly enacted by both Houses of the New York State Legislature 28 CFR 51.27(g) became law (Chapter 138 of the laws of 1992).

The submitting authority 28 CFR Sec. 51.23 is the State of New York acting through its Legislature.

This submission contains all of the information and documentation required under 28 CFR Sec. 51.27 ("Required Contents") and 28 CFR Sec. 51.28 ("Supplemental Contents") except for the demographic data which will be sent shortly.

Names and address and telephone numbers of Assembly and Senate Contact People

a) Process and Law

Assembly	Senate
Jeffrey M. Wice	Michael A. Carvin
c/o Dickstein, Shapiro &	c/o Shaw, Pittman,

Morin
2101 L Street, N.W.
Washington, D.C. 20037
(202) 861-9197

Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

b) Data and Mapping

Alan Gartner, Ph.D
Graduate Center CUNY
33 W. 42nd Street
Room 1610
New York, NY 10036
(212) 642-2062

II. Analysis of Change to Previous Law (51.27(c))

The Redistricting Plan for Congressional Districts for the State of New York enacted by the Legislature in Chapter 138 was designed by referees appointed by New York State Supreme Court Justice James A. Shaw as a result of litigation in Reid et al. v. Marino et al. No. 95671/92, ordered and judgment (Kings County Sup. Ct. June 8, 1992). The Report of the Referees to Justice Shaw explains in detail the background leading up to the development of this plan by the referees for the State Supreme Court. On June 8, 1992 Justice Shaw issued an order implementing this plan as state law and ordered the State Board of Elections to effectuate its implementation.

On Monday, June 8th, the New York State Senate enacted the State Court plan as a bill in S. 8610. On Tuesday, June 9th the State State [sic] Assembly followed by enacting the same plan in A.11921. Governor Mario Cuomo signed this legislation on Friday, June 12, 1992. This law, incorporating the state court plan, is being submitted for preclearance. The Report of the Referees follows.

Appendix B

Racial Breakdown District 12

	NHwhite	NHblack	Hispanic	NHAmeri	NHAsian	NHother
Total	81,303	50,426	335,817	1,487	108,357	2,947
Total %	14.01	8.69	57.87	0.26	18.67	0.51
Total18+	68,891	34,828	227,062	1,033	84,592	1,524
Total18+%	16.48	8.33	54.33	0.25	20.24	0.36

CONGRESS Plan State Racial Breakdown

Di#	County	MCD	PART/	Total	Total18+	HISPANIC	NH White	NH Black	NH Amind	NH Asian	NH Other
12	Kings County	Brook-lyn	PART	292895	198089	197987	38499	33729	881	20145	1654
	New York County	Man-hattan	PART	124854	95244	45127	17042	10419	233	51757	276
	Queens County	Queens	PART	162588	124597	92703	25762	6278	373	36455	1017
12				580337	417930	335817	81303	50426	1487	108357	2947

(As 3:30 pm May 31)
Referees' Plan

Districts Report -- Registered Voters 1

Dist	TotPop	TotRV	%Dem	%Rep	%Con	%Lib	%Rtl	%Ind	NH W % of RV	NH B % of RV	NH A % of RV	HSPC % of RV
6	580337	224389	73.71	12.05	0.62	0.67	0.07	12.41	30.98	60.40	1.01	7.61
10	580338	238023	81.07	6.67	0.28	0.70	0.18	10.84	24.95	59.84	0.86	14.35
11	580337	181050	80.64	6.12	0.26	0.70	0.17	11.83	18.96	72.54	1.15	7.35
12	580338	165668	73.05	11.4	0.49	0.82	0.18	13.81	29.77	15.06	5.31	49.86
15	580337	243958	80.06	6.50	0.27	0.83	0.23	11.92	22.91	51.47	1.09	24.53
16	580337	217518	81.25	6.37	0.55	0.68	0.28	10.73	6.84	43.56	0.55	49.05
17	454628	176086	75.64	10.04	0.69	0.72	0.38	12.31	40.12	37.68	1.03	21.17

Registered Voters Report II

Dist	Tot.Reg Dem	% of NH W	% of NH B	% of Hspc	% of NH A
6	165401	31.44	61.31	6.63	0.63
10	192976	25.15	60.32	13.85	0.68
11	145997	19.14	73.22	6.80	0.84
12	121024	28.85	14.59	53.10	3.47
15	195316	23.37	52.51	23.27	0.85
16	176737	6.92	44.02	48.62	0.44
17	133186	40.23	37.79	21.24	0.74

Appendix C

Reid v. Marino, Index No. 9567/92
Excerpt from a Transcript of
a Hearing on June 2, 1992,
before The Hon. James H. Shaw, Jr.
[pages 106-132]

THE COURT: Good morning, counsels, members of the press, and the parties who happen to appear with their lawyers individually.

This morning, since we are all here, with certainly, you, with a large measure of curiosity, and I know that there are things to be taken up, but to orient you as to where things stand so far as the Court is concerned at this point, the final product, in terms of the referees' material and report to me, is not yet completed. I will get more into that later.

But Mr. Gartner, one of the technicians who has been working very hard on this matter, and knowing how important time was to us, and realizing that I had adjourned this matter for today, has volunteered to interrupt what work they're doing and, with maps that are going to be put up here (indicating), before we go into --

And I know there are applications to be made because it's come to my attention, at least through calls to my law secretary, Mr. Warren Glasner, that there are applications for substitution of counsel and all those kind of things.

But before we get into all the technical things, we have this gathering here because they're interested in geography, and to the extent that I can make a minimal gesture, even though we're still in the process of some fine-tuning, we're going to go about that.

And, Mr. Gartner?

MR. GARTNER: Yes, sir.

THE COURT: Let's see. This show will be, sort of, in your

hands, all right?

(Whereupon, maps were posted on blackboards situated in the well of the courtroom.)

MR. GARTNER: We have presented to the Court a set of maps for the entire state. There are these three-by-four, black-and-white maps for the entire state; one for upstate, one for the city, one for Nassau, and one for Suffolk. The Judge will make them available to you at his discretion.

THE COURT: Let me just say this, gentlemen: Even though you won't have the -- and ladies: Even though you won't-- the parties, that is, won't have the -- how can I put it? -- like real estate lawyers would say, "metes and bounds," you know? Beginning on the north side of whatever, or proceeding along the Genesee River till whatever? That kind of thing. That's yet to come.

Nevertheless, I believe that, you might call it, the gross description will satisfy those that are -- satisfy, and disturb those that will be disturbed.

So, at least, since you've all been good enough to be here this morning, and this business with computers takes long --

We were delayed, of course, by the federal people having control of the computers, pursuant to that injunction, which they did not complete their work as soon as legally or -- we had the option to go, it wasn't there because they were being occupied.

So we have a backup in time, but nevertheless, I want to give you what I can at this point.

MR. GARTNER: All 31 districts are at zero deviation in terms of the one person-one vote standard. Given the arithmetic that there are only whole persons, there are eight districts, obviously, that have one more than the others, but that is considered zero deviation.

Let me briefly describe upstate -- I'm going to focus on the

city and this map with the colors that's slightly easier to deal with.

Upstate, the basic principle was to keep the counties whole, to split only one county and then to split only one town within that county, in order to deal with equal population requirement. For the most part -- and there's sufficient detail in that, I believe, for those who are particularly concerned with upstate -- we did that.

On the Island, now shifting to the opposite extreme, we did the same thing: kept Suffolk County whole.

There are, in Nassau -- there are two whole districts in Suffolk County. There are two whole districts in Nassau County and approximately half of a fifth district, which that then connects with the City.

And there are three-by-five maps, same size as that (indicating), of Nassau and Suffolk County. I will not describe those any more at this point; and if you have questions, per the Judge's instructions to me, I'll try to answer them.

Let me turn and describe the city (indicating).

The instructions of the Judge to the referees, and therefore, their instructions to us, was to honor, in order, the criteria of the federal Constitution: one person, one vote; the Constitutional amendments and the Voting Rights Act that concerns so-called "minority districts"; and then, third, those other factors appropriate for districting.

Having honored throughout the effort the Constitutional standard of one person, one vote, we then turned in the city to honoring the second criterion, those concerning Constitutional amendments and the Voting Rights Act.

A small postscript on upstate and the island:

There are not, per the tests of Thornburgh, or Gingles, whichever way you want to refer to that case, sufficiently large and/or concentrated populations of the protected classes

to form an entire district. But it was our understanding of the ethos of the Voting Rights Act, if not the language or the case law, that, where possible, clusters, or, as Professor Grofman calls them, "kernels," or cores, of minority groups should be kept whole.

So, for example, we kept whole the minority population in Buffalo and Rochester; we kept who the black population in Nassau County.

Okay. Now, to turn to the city.

For those of you who do districting with computers, you know that one of the things that the computer can do is it can produce maps which translate the Census numbers into geography, showing you, for example, concentrations of particular population groups. And so, we produced a set of maps that show the concentrations of the three so-called "protected classes" in New York City; in Census language: "Non-Hispanic blacks, non-Hispanic Asians" and "Hispanics."

In effect, those concentrations tell you how to do the districting, per the Voting Rights Act. And the order in which I will describe these districts, in effect, reflects our using those concentrations as the basis.

There is a concentration of -- now to shift to the terms I'm more comfortable with -- of African-Americans, or blacks, in Southeast Queens and on most of the eastern two-thirds of the Rockaways. And so, we drew a district in Southeast Queens here (indicating).

With one exception, all of our New York City -- I'm sorry. With two exceptions, all of our New York City districts are in the City. There are only two districts that cross the city line; one, the inevitable crossing into Nassau, and secondly, a crossing here (indicating), into Westchester.

I need to ask the Judge a question. Excuse me.

(Discussion off the record between Mr. Gartner and the Court.)

MR. GARTNER: As I said, this is a district entirely in Queens County. It is a district --

And we have several sets of data. Let me talk only about the Voting Rights Act data here, although we also have political data which we used.

Several sets of data were used. We used two sets of data which are derivative from the Census; namely, total population, which the Census then breaks down by subset; and voting age population, or "VAP," by subset.

The third set of data we used were a set of estimates of registration by race. The Board of Elections, as you know, produces the names and addresses of registrants, and so, you can translate, by the computer, into where a person -- whether they live in a particular district.

New York State, unlike some states, does not indicate the race of registrants. The Census does. You can marry, in a technique that at some point I'd be glad to describe, that the Districting -- New York City Districting Commission, whose executive director I was, and other bodies have done, that will give you an estimate of registration by race.

Since we used the New York City Districting Commission's database to do that, those data are only true for New York City. I will give you some estimates about this district (indicating), but they're only true for New York City.

The district in Southeast Queens, District No. 6, has --

And all of this is in the appendix, which the parties have this document; it's in Appendix O, in a document called "Referees' Plan, Minority Districts," the very first page of it.

The black, or African-American, population of that district is 53 percent black population, total population; 51 percent VAP, but 60 percent estimated black registration.

We thought that that was a district that would give the African-American population in that community a reasonable

chance to elect a Representative of their choice; therefore, we did not find it necessary to go out of the County of Queens.

There are basically no blacks around the periphery of this district. So if we wanted to add any blacks to this district, we would have to go out of the county and city, and that was something we didn't -- per the instructions of Judge Shaw, that was the third criterion that we sought to honor, as long as we didn't dishonor the other two criteria. So that's District No. 6.

For those of you who know New York City geography, the Rockaways are about -- the western two-thirds is white, and there's a little tip of white population here (indicating). We tried to makes this district as black as we could, so we shreded [sic] that tip out (indicating).

Next, in the South Bronx, District 16. Again, the Hispanic concentration maps that were produced per the Census show the Hispanic concentration population in the South Bronx.

Again, a general principle that we sought to follow was, we sought to have the districts, to the extent they would, meeting the two upper criteria, one person-one vote and Voting Rights Act issues, emerge from the existing districts rather than behave as if there were not any reality and continuity that was of some importance.

So in this instance, this looks like, with the necessary population expansion, per the drop from 34 to 31 districts, like the district that's down here (indicating), that currently is represented by Mr. Flake.

This (indicating) looks like, the same point, the district currently represented by Mr. Serrano. It is wholly in Bronx County.

And the numbers here, again from the same document, now Hispanics: 60 percent Hispanic population; 58 percent Hispanic voting age population; and 49 percent Hispanic, estimate, registrants.

There are two patterns that one finds almost everywhere in New York City. Since the Hispanic --

If you think about the population by age, the white population, on the average, is the oldest; then the black population; then the Asian population; then the Hispanic population. So you will always see the white percentage of the total go up from total pop. to VAP; you will always see the Hispanic percentage going down, total population to VAP.

Secondly, the whites are more likely -- no always, but more likely as a group -- to be citizens and thus eligible to register. At the opposite extreme, Asians are less likely to be citizens and less likely to register. Blacks are closer to whites in that regard; Hispanics are closer to Asians.

So generally you will see, as you did in this district (indicating), that the black percentage of the population went up as you moved total pop. to VAP to reg., while the Hispanic population goes down.

That's a general pattern that will be true citywide. It's of most interest when I get to the next district, which is the one in Central Harlem.

We kept this self-contained in Bronx County for two reasons -- three reasons: One, we could meet the standard -- having met the one person-one vote standard, we could meet the Voting Rights Act standard without going out of Bronx County.

Second, the Hispanics that you could "lasso" in, to use the computer word, or grab in, or whatever verb you want, either here (indicating), in Washington Heights, which is largely Dominicans or either here (indicating), in Northern Queens, largely South American Hispanics, differ from the population group here (indicating) in that they are not necessarily citizens, thus less registered, thus less likely to appear in the polls.

And so you produce, in effect, a district, were you to bring in -- that you would produce a district that would increase its

"Hispanicity," Professor Grofman's word, but you would not reduce its effective participation in the political process.

Okay. Third district: The district has as its core Central Harlem. Its resident now, and also resident in -- as we proposed, is Mr. Rangel. It is with one exception entirely in New York County; it comes, basically, from the upper 80's and sweeps north all the way to the tip of New York County.

For those of you with arcane New York City geographic knowledge, you will know a portion of New York County is on the mainland of the continental United States as a result of a meander of the Harlem River. Amazing what one learns in this.

In order to meet the population standard necessary for this district, we included Rikers Island, which is part of the County of The Bronx, although it is connected to the County of Queens. Its population, 14,000 people or so, is overwhelmingly Hispanic. It, however, is a population that does not participate in the elections.

Let me give you the numbers on District 15. And here the slope question that I described to you a moment ago becomes amazingly apparent; it's the most interesting district in that regard. Here I'll give you both black and Hispanic numbers, and I'll give it to you in pairs:

At the total population level, this district is 46 percent Hispanic and 37 percent black. That reflects the current district, the district that has over a number of years elected Mr. Rangel.

At the voting age population --

So if you want to hold in your head, its ten percent more Hispanic than black.

At the voting age population, this district is 43 percent Hispanic and 37 percent black. That gap is now married -- narrowed to six but it is still, in numbers, if you will, an Hispanic plurality.

However, at the registered vote level, that district is 51 percent black and 25 percent Hispanic. The slopes have crossed (indicating). So, instead of a gap of seven percent more Hispanic than black, it is in fact 15 percent more black than Hispanic at the estimated registration level.

It's a function of the age and the dispersal of New York City's minority population.

So that is the third, quote-unquote, minority district.

If you look at the concentration maps -- I'm now moving to Northern and Central Brooklyn -- it is clear that there are enough people for two times 580,000, for two black districts in Central Brooklyn. The operational question is not whether or not there should be two black districts, and all the parties to this case do draw two black districts, but is the dividing line within that circle. And in fact, because we understood that issue, what we did was to draw a double district, a million .1 people, and then we played with the issue of the division.

The factors --

So you have this -- so it is this -- lavender? Is that fair? -- this color and this color (indicating), District 10 and District 11.

The current resident of District 11 is Congressman Owens, and the current resident of District 10 is Congressman Towns.

Let me emphasize that this discussion of residence is simply a shorthand meant for convenience, and two, of course, there's no residency requirement. So to call anything So and So's district presumes a decision that person will make, which neither I nor the Court are going to make.

Just as we were aware of the difference between and among Hispanics in crafting this district (indicating), we needed to understand the differences between and among African-Americans in this district (indicating). They are differentially citizens; they differentially participate in the

election process.

The crude cut is between so-called Caribbean blacks and non-Caribbean blacks. There are other, much more fine-grade cuts, but that surely is the first cut that one has to make.

Secondly, the Voting Rights Act case law instructs us to look at questions of crossover. Although New York City is a city characterized by racial block voting, not only are Hispanics and blacks variegated within its group, so too are whites. So that we needed to understand the difference between the whites in Canarsie, who historically have not crossed over to vote for minority candidates, and the whites in Park Slope, some of whom, on some occasions, have historically crossed over.

So a part of the analysis I told you we did -- we did look at political issues -- was to analyze the geography of the -- since we're basically talking about Democrats here -- the geography of the Democratic primary, the Koch-Dinkins Democratic primary, the Jackson-Dukakis Democratic primary, and we began to look at some of the City Council races to understand the question of cohesion as it's used in Voting Rights Act cases, or crossover issues, the goal being to craft a District 11 and a District 10, two districts in Central Brooklyn that gave a real, not paper, opportunity to the black communities in each of those districts to elect a representative of their choice.

Let me give you the numbers there:

In District 11, the yellow district, it is 69 percent black population, 67 black voting age population and 72 percent estimated black registration.

In the District 10, the horseshoe around it, on top of it and on the side of it, you get a slight change; its 56 percent black population, 55 percent black VAP and 60 percent are black registration. So you have one district 60 percent black registration and the other district 72 percent black registration. It's because of a different -- differences in the

white population remaining.

We sought, per the general understanding of these issues and Voting Rights, in every case to keep the white population down as low as possible. So that, for example, in the -- in District 10, the white population is less than a quarter of -- at the registration level; and in District 11, the yellow district, the white population is only 19 percent at the registration level, at the political level.

So we now have five minority districts: one, two, three, four, five (indicating).

Again looking at the concentration maps, one sees, as everybody who drew maps in this case as well as in the other jurisdiction, that there is a potential, if you're not bound by antiquated notions of compactness, for an additional Hispanic seat, what in shorthand -- this is District 12, the orange seat, the so-called "Tri-county Seat."

What you see when you look at the concentration maps is a band of Hispanics that come across Northern Brooklyn -- this is the Brooklyn-Queens border (indicating) -- that comes across, basically, Northern Brooklyn with a small incursion into Queens. And if you forgot about the East River, it comes across Manhattan, into the Lower East Side.

You then see a concentration of Hispanics in Sunset Park and a little bit in Red Hook, and you see a scattering of Hispanics, those Northern Queens Hispanics that I talked about, that we didn't choose to bring up into the Serrano district but we use here (indicating).

And so, what we did, as everybody did, is we drew a district that basically looked like this (indicating), with three legs.

We had a second concern at the same time, which was that there is a third group, protected class, in this city; namely, Asian-Americans. And for the most part, they live adjacent to Hispanic population in this city. So there is an Asian concentration next to the Lower East Site, called

Chinatown. Or an Hispanic concentration next to Chinatown. I don't mean anything by describing the history.

There is an Asian population, what some people call the "Second Chinatown," to the south of the Hispanic population in Sunset Park, and then there are two Asian concentrations in Queens, two kernels, or cores.

Our goal was, at one and the same time, to see if we could maximize the Hispanic population in this district while including as much of the Asian population as we could.

And one of the unique features of this map is, I think we've had our cake and eating it. We've produced a district at the voting age population --

I'm sorry. There is no incumbent resident in that district, for whatever that means.

At the voting age population, we have produced a district that is 54 percent Hispanic voting age and 20 percent Asian voting age. Or, to take the other side of it, it is a district 30 percent white voting age population.

So that's six districts in which a single minority or a coupling together of two minorities are a majority.

The seventh district we drew is a district that's the second district that crosses a --

I'm sorry; let me just go back.

This district (indicating) is wholly within one county; this district (indicating) is wholly within one county; these two districts (indicating) are wholly within Kings County; this district (indicating) is in New York County with a little incursion into Bronx County; this district (indicating) is a tri-county district, in New York County, Kings County and Queens County.

We then drew a district, the second one that crossed the city line, the first one being this district (indicating), which I

haven't described to you yet, and we drew a district that was in Bronx County and Westchester County.

I don't have a version of it but I'll describe it to you. Essentially, what we did is, we wanted to -- we linked together the black population, which is here and here (indicating). I'll describe that in a moment. There's a black population up here (indicating), in Yonkers and there's a black population that picks up over here (indicating), Pelham and New Rochelle and so forth.

The district looks like, for those of you who are into animal characterizations, antlers up at the top. It is a district in which Mr. Engel is resident.

It is a district that at the VAP level is 36 percent black and 26 percent Hispanic. It is 62 percent minority, or, if you want the white numbers, it's 31 percent white VAP.

We don't have the estimated registrants because there's a portion in Westchester County and we don't have the data to do that. We do know the estimated registrants in the New York City part of it, and our understanding of the Westchester population is that that group of African-Americans is similar to this group (indicating), middle class and home owners, and the estimates that we have are correct.

What you have here, the African-Americans population here -- if you wish to think about it in Assembly terms, this (indicating) is Assemblyman Seabrook's area. If you wish to think about it in Council terms, this (indicating) is Councilman Larry Warden's area. If you want to again use the Council terms, this finger (indicating), this is largely the blacks in Reverend Wendell Foster's Council area.

So you have largely a home-owner, middle-class, high-political-mobilization black community. And so, I believe it's reasonable to expect that the rate of political participation will be more like the blacks down here (indicating), in Southeast Queens, than the blacks in Central Brooklyn. So that registration, the registration numbers, will be very close to the

VAP numbers.

That is the seventh minority district that we have drawn; it's a 62 percent minority district at the VAP level.

The next districts, in no particular order:

We drew a district here (indicating), the entirely to Richmond County and adjacent Kings County (indicating); basically, the Bay Ridge area.

Although the law is not clear about whether connections across water need to have things that connect them, and not just going up the Hudson River and the Erie Canal connecting Buffalo to a piece of New York, I guess because it was stuck in my head, the requirements of the City Charter, that when you cross water you have to have a bridge, tunnel or regular -- causeway or regular ferry service, we have done that. Every parcel that's on two sides of the water is connected by a bridge, tunnel, causeway or regular ferry service.

This (indicating) is connected by the Verrazano. Okay.

We have drawn a district here that goes from Coney Island, snakes, or whatever verb you wish, slides, through here (indicating), coming under the bottom of the Hispanic -- Asian population here (indicating), goes along the Brooklyn waterfront, goes through the Brooklyn Battery Tunnel and runs up to here (indicating).

It is current. The residence of Mr. Solarz is in that district.

While I'm still at --

And it includes two counties, Kings County and New York County.

While I am still in New York County, here is another district (indicating). It is essentially the east coming down from the south of District 15. This is about in the mid 80's; it's a little jagged edge.

The one person-one vote standard requires very peculiar-

looking perimeters.

It comes down, basically, the east side of the park; tucks in a little bit under here (indicating), in the Theater District; comes down here (indicating), picks up this white population here (indicating).

For those of you who know New York City geography, this (indicating) is the Grand Street Houses. The purpose in doing that was to increase -- to keep high the Hispanicity of this district. In fact, we didn't want that population in this district (indicating); it had to go somewhere, until it's linked in here (indicating).

We come across here (indicating), to white Greenpoint, and in order to come to the population standard, we come across in here (indicating), to a portion of Queens County.

So this is a three-county, largely white district, New York County, Kings County, Queens County; it includes the residence of -- current residence of Mr. Green and, in this little finger here (indicating), the current residence of Mr. Weiss.

A third of these non-Voting Rights Act districts is --

The dark blue includes the current residence of Mr. Solarz; the light blue includes the current residence of Mr. Schumer.

It comes down here (indicating); comes in underneath the district that we had done, which are two Voting Rights Act districts; swings out here (indicating); picks up the white, western two-thirds of the Rockaways; a little tip here (indicating).

Its a legitimate contiguity connection; it's what someone called a "high-tide contiguity," or "low-tide contiguity." But, forgive the metaphor, it's a kosher district by the rules.

And it picks up these western two-thirds (indicating). It goes as far up, between the edge of this Voting Rights Act district and that Voting Rights Act (indicating). That's why the neck is narrow. It goes as far up as we needed to get the

580. We just kind of inched our way up until we got the 580.

Okay. We then have, again in no particular order, three more districts to describe.

You got half a district coming in from Nassau County. The purple is the other half of that district. It includes the current residence of Mr. Scheuer. It is a largely white --

I mean, all of these after the seven are largely white districts.

This district here (indicating), to a considerable extent, mimics the current district of Mr. Manton and it includes the current residence of Mr. Manton. The big exception from the current district is, it crosses into Bronx County. So you have a bi-county district here.

And then the last district includes the remainder of Westchester County, after you've had Fish and Hamilton coming own into Westchester. After you've take out the portion of District 17, there's a remainder of Westchester County that includes the residence of Miss Lowey, over here (indicating), in Rye.

So you've got a hunk of that district in Westchester County. You've got a piece of that district in Bronx County.

The map is deceiving, not intentionally so, in terms of a large portion of this is water. The land area is basically along here (indicating), and it comes down and it includes the "other residence" of Mr. Ackerman.

So t is a tri-county district in which there are two incumbents.

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Appendix D

Reid v. Marino, Index No. 9567/92
Excerpt from a Transcript of
a Hearing on June 5, 1992,
before The Hon. James H. Shaw, Jr.
[pages 228-252]

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* * *

MR. GARTNER: I'm Alan Gartner, I served at the pleasure of the referees, as one of their three experts, per your Honor's order, with my colleagues Professor Wendy Brown of Tulane University Law School and Mr. Michael Petreites of the College of Staten Island....

The referees presented to the Court yesterday, and it has been given to the parties -- I just want to make sure -- a final referees' report, which includes a report, a set of appendices and several sets of maps.

I want to note, as your Honor knows, that there is a revised Appendix J, which is a revised set of metes and bounds.

There has been some confusion, if I may say, as to the criteria that the referees instructed the staff to follow in pursuit of your order. They were clear with us and we were clear as to our obligation.

Criterion number one was the Constitutional standard of one person, one vote. Only when we had met that, and that was met a zero deviation, then we turned to the Voting Rights Act standard. Only when we met that did we turn to other criteria.

There was no sacrifice of criterion two in order to meet criterion three. There was no sacrifice of criterion one in order to meet criterion two or three.

In looking at that third set of criteria, we were concerned

with community of interest, with history, continuity and compactness.

Parenthetically, let me note that for Congressional districts there is no residence requirement, so that when we talk about So and So's district, that is a -- that is also a presumptuous statement. Each person in this state can choose to run. Each person who is an adult and otherwise eligible to run for the Congress is able to choose where he or she may wish to run. And so, we did not place anyone, or can anyone place anyone, in a district.

Let me just summarize. All districts in the plan presented to you are at zero deviation. All districts are contiguous. We were faced with the fixed reality of going from 34 to 31. That makes for an extraordinary complication. I suspect I know that perhaps best of anyone, since I had the luxury, in working for the New York City Districting Commission, of going from 35 to 51, a much easier game, your Honor.

Let me just talk about the process that the referees instructed us to go through and the process which they went through. There was some confusion about that.

The referees would have been pleased to find one of the extant plans meeting the standards of the Constitution and the statute. They reviewed and had the staff review and review again with great care all of the plans presented in this Court. They did not find any which, in whole, on all fours, if you will, met the standards that you instructed them to honor.

It was only then, only after having done that, that they then turned and instructed the staff to begin to craft a plan. They told us, if I may be flip for a moment, plagiarism is not a sin in this activity. Where we say something that was good, we grabbed it, with no pride of authorship.

And as a number of people have noted, there are districts in the plan that the referees have recommended to you that mimic, in one way or another, a plan that -- a portion of a plan that we found. We took that as a plus, not as a negative.

Let me turn to the so-called "minority-majority district." We took our guidance in crafting those districts from the law and the federal statute and the cases interpreting that statute, from what we call the "concentration maps," and I'll turn to that in a moment.

But we then did a third thing, which I think is unique in the work of the various plans around the city, in this forum and the other, and so forth; we did what the Supreme Court has instructed to be done in terms of crafting districts per the Voting Rights Act; we did a locally intensive analysis, or what my colleague Herman Jenkins calls, "we looked at the facts on the ground."

We were concerned with voting age population, which the cases say we should be concerned with, but we were also concerned with registration and turnout. I think that distinguishes the plan proposed to this Court as compared to the plan proposed to the other Court.

We were also concerned, within the various groups, to disaggregate the populations. Particularly, "Hispanics" is a category of the Census; it does not distinguish between and among Hispanic groups. But their participation in the electoral process, which is, of course, what we are talking about here, is distinguished by the fact that some are automatically citizens, Puerto Rican Hispanics, while others may or may not. You cannot treat, if you will, the Hispanic population as a single unity in considering the Census data when we then look at the electoral process.

So too with the black community. The Census talks about "non-Hispanic blacks" but it does not distinguish between and among, to just take one cut, the so-called "Caribbean blacks" and "Native Americans," the former [sic] of whom, again, are citizens; the latter, some may and some may not. We sought to distinguish between and among those groups.

Finally, following the guidance of perhaps the single, more-qualified expert in this entire field, Bernard Grofman, with whom we worked closely in the New York City districting

work, we were concerned with the percent of non-Hispanic whites in a district.

We were concerned, as several of the people who have talked this morning, to keep that percentage down so we do not, in effect, violate the opportunity of a so-called "protected class." Or a group of protected classes in a district to have their rights violated by another group, who may tilt or switch the election. That too was part of our analysis, and I will refer to that as I go through this.

Let me talk about the seven districts in some particularity, but let me not repeat what the Court has already heard, at least from me, several days ago.

The order in which I'm going to talk about these groups ought not represent anything about importance; it simply moves east to west, and that's the numerical system we used. We started with the first district in Montauk and we then got to the city. Okay.

Let me talk about Southeast Queens, District 6, here (indicating). It has a voting age population, African-American, or "non-Hispanic black," as the Census calls it, of 52 percent. But, as is generally true throughout the city and most particularly true in that area, the registration of African-Americans goes up; it is, in fact, 60 percent African-American at the registration level.

Not only are there the differences among African-Americans that I talked about before, or "non-Hispanic blacks," to use the Census term, there are differences in communities. The turnout rate, as Mr. Wooten and other alluded to, is much lower in this area (indicating) among African-Americans than it is in this area (indicating). One needs to be mindful of that fact when one looks at the various districts.

So we have, in this area of Southeast Queens, a non-Hispanic black majority at the VAP level, the voting age population level, an even higher African-American rate at the

registration level, and an even higher rate when one turns to mobilization.

Let me call your attention, your Honor, to this map (indicating). This is a map that we drew based on the Census, the Census total population. I want to emphasize that because it does not distinguish voters; it distinguishes people. And it is total population, not VAP, so it does not distinguish adults from nonadults. And it does not distinguish, as the Census does not at all, between citizenship, no less registrants. But nonetheless, it is a useful starting point.

The richer the shade (indicating) -- there's a code here (indicating) -- the more intensive the population group. And we're talking here about non-Hispanic blacks.

In effect, your Honor, this district draws itself (indicating). The test is: "Have we included all of the population that is contiguous to this area?" As you can see, the black outline -- and what we have done is, we have concentrations and then we have overlaid with these black lines (indicating) the districts we drew for the seven so-called "minority districts." This district is this same district here (indicating), this shade, without the squiggles, here (indicating), and it includes most of the eastern third of the Rockaways; it incorporates all of the areas of intense black population here (indicating).

You will see that we carefully crafted, with wiggles and squiggles and darts and arrows and so forth, around this population in the Rockaways, and, indeed, we didn't take the whole eastern third of the Rockaways. There is a large population, tucked right here (indicating), in the very eastern end, that you will notice is white, white on the map and white in population. We shreded [sic] that out of this district because we wanted to maintain its strength, the African-American population strength, over in this district.

In sum, we do not believe, unlike the map that Master Lacey has reported to the federal Court, that one needs to go out of the City of New York or the County of Queens and

reach into Nassau County to add to this district. We believe so would, A, be packing this district; B, making the Nassau black population a tail on a Queens white; and, three [sic], denying that population an opportunity to participate in elections in their county of residence.

To turn now to Central Brooklyn, one can see in this area here (indicating) a large core, which, in fact, is sufficient for two whole districts. If you drew a line around these two districts, a double district, there are in fact nearly three-quarters of a million African-Americans there, 733,000, out of a double district of a million-one, 580,000 times two.

The question, then, is not whether or not one can or cannot draw a district here; the question is how you divide that district.

But before I turn to that critical and difficult question, there is no need to go out of the County of Kings in drawing that district, no Voting Rights Act need; and, having found that there was no Voting Rights Act need, then we come to criterion three, which are the other factors.

Again, we do not believe, as Judge Lacey's plan does, that you need to stretch one of those districts into Queens County.

But let me emphasize, we only turned to the question, in criterion three, having satisfied ourselves that we met criterion two about the Voting Rights Act. No sacrifice was made in the Voting Rights Act standards to deal with other issues.

District 10, this district here (indicating), the horseshoe district or horse-collar district or whatever metaphor you wish, has a voting age black population of 55 percent and a black registration at 60 percent.

This district here (indicating), 11, the one in yellow, has a voting age population, black, of 68 percent, 13 percent more on the voting age; and a 73 percent estimated black registration, again the same 13 percent.

Let me note, as your Honor knows, of course, that when one turns from voting age population to registration, you have incorporated the notion of citizenship. The voting age population does not discriminate, as the Census does not, between citizens and non-citizens, but it is only citizens who may register. And so, we have accounted for the issue of citizenship when we used registration data. But registration, while it subsumes citizenship, does not deal with issues of turnout and issues of so-called "crossover" between other groups: whites, if you will, supporting or not supporting, the points that Miss Simpson and Mr. Wooten raised.

These are close issues. While I believe the plan that the referees have recommended to you on this point, in particular and overall, is a plan that, in all parts, comports with the requirements that you laid upon the referees, there are nuances and judgments that one, in good faith could make that are different. But I do believe what the staff has provided to the referees and they have recommended to you fully comports with the standard you set.

Let me just say one further thing about that district, to pick up on a point that I made a moment ago. These two districts, both singly and together, in comparison with Master Lacey's plan, both include more blacks and fewer whites, and we did that intentionally, for just the kind of point that Mr. Wooten raised. We were sensitive to that.

And indeed, let me express my appreciation to Mr. Wooten for his tutoring me over the last tow years about that nuance. I may not have learned it as well as he may have wished, by [sic] I certainly have heard it and understand.

Let me turn to the so-called "tri-county district," District 12, this band across here (indicating), in Brooklyn; a little bit into Queens (indicating); a leg down here (indicating), into Brooklyn; a leg, or whatever you want to characterize this as (indicating), up into Queens.

This district, or something like it, is drawn in all the plans all over town, all the plans presented to this Court or the

plans presented to the federal Court, including the so-called "PRLDEF plan," as well as the plan that Master Lacey recommended to the three-judge panel.

The district that we have drawn is 54 percent Hispanic VAP and 50 percent Hispanic registration. It equals the Lacey plan at the registration level.

I do not believe you can richen its Hispanic population.

But we have also done something else, which Mr. Lacey, and indeed his expert, Professor Arrington, specifically said they didn't choose to do, which is, indeed, we had a concern for the third covered class under the Voting Rights Act, Asian-Americans.

Let me apologize for not bringing a third concentration map. We did draw it and we did use it, and I think the proof is in the pudding, as I will note in a moment.

We, in District 12, have an Asian voting age population of 20 percent. It is the highest Asian voting age population of any plan across the board, including the Majority Coalition's plan.

And although I will accept what Miss Simmons said -- I've had a long experience taking orders from her, when she was the vice-chair of the Districting Commission; I've always accepted her judgments.

Although, perhaps, there are one or two Census tracks that we may, at the option -- on the margin, could have included, let me emphasize that although those districts were included in the Majority Coalition's plan, its Asian VAP is lower than the Asian VAP in this plan; it is lower by one full percentage point.

We all know, as does Miss Simmons and surely Miss Koo, who was a tutor to me also on the Districting Commission, that there is a very sharp drop-off from VAP to reg. in the Asian Community, but nonetheless, I think it is important and useful to try to maximize the Asian population, if you can do

it without expense of the Hispanic population.

And the answer is, your Honor, in this instance, you can have your cake and eat it, too.

Let me note Mr. Baca's comments about that district and say, I was pleased to hear his support for that district. I believe it is the best Hispanic district you could draw, as well as also the best Asian district you can draw. It includes, as Miss Koo indicated, the three -- or, if you will, two and a half of the three Asian cores around the city: Chinatown, Sunset Part and one of the two smaller Asian cores in Queens. You just can't reach far enough for the second small Asian core.

It is a historic act, what the referees have presented to you in terms of the Asian community, and one I think warrants emphasizing and note.

Let me just, before I leave District 12, refer to this map (indicating), which is Hispanic population again. Doesn't deal with citizenship; doesn't deal with registration. It's Hispanic population.

Its no disrespect to the drafters of this district to say it is aesthetically unpleasing. But if you look at these shapes and wiggles and darts and fingers (indicating) and whatever you want to call them, it mimics what you see over here (indicating).

Why do we drive down here (indicating)? The population concentration of Hispanics, and similarly in this instance the population concentrations of Asians, tells you to drive down that far. We go as far, but not any further, than the Hispanic community goes in this area of Southern Brooklyn (indicating).

Why this strange and peculiar configuration up here (indicating), of 12, as it wanders around? We seek to mimic the Hispanic concentrations up here (indicating), and the same thing in the band across Northern Brooklyn.

And parenthetically, here (indicating) you have living close together an Asian-American population in Chinatown and an

Hispanic population in the Lower East Side. But there is a white population, the so-called Grand Street Houses, here (indicating), which we brought out of that district for the purpose of trying to keep as high as possible the Hispanic and Asian population in District 12.

Let me turn to Central Harlem. In Central Harlem one sees illustrated most dramatically why you need to look not just at VAP but at registration.

In voting age population, the district we have proposed, this district here (indicating), 15, that is anchored in Harlem, is 37 percent black VAP, 46 percent Hispanic VAP. In other words, it is "minus-nine" black, if you want to use that term. But when one turns to registration, estimated registration, it is 51 percent black registration and 24 percent Hispanic registration, an amazing shift of 26 [sic] percent as you move from VAP to registration.

How could that be? Well, because there is a large percentage of Hispanics who are included in VAP, Dominicans here (indicating), who are not registered, and a somewhat large but not nearly as large percentage of Hispanics in "El Barrio" who are not registered.

To refer just for a second to the work of the Districting Commission, which Miss Koo referred to, the City Council districts are one-fourth the size of Congressional districts. You have very different play when you're doing that. So, in fact, the Districting Commission crafted a district up here (indicating), which, for the Dominican community, in any terms, if you simply looked at the numbers, your Honor, you'd have thrown that out of court and said it was packed.

But the Districting Commission, mindful of the very low registration, pushed that -- pushed -- that district is over 83 percent Hispanic. You'd say that's packed.

You can't make a real district at the Congressional level --

And I believe, as Mr. Baca indicated, the district that Master Lacey has proposed, using the Hispanics here

(indicating) and other Hispanics, is not a real district, not a district, in fact, that gives that community an opportunity to express its choice. In fact, it has expressed its choice over time in the district where it is.

You don't need to stretch a Central Harlem district into The Bronx and Westchester, as Master Lacey has proposed. You can satisfy fully and completely criterion two, in terms of the Voting Rights Act, with this district (indicating); and then, as I indicated before, you ought to look at the other criterion, criterion three, staying in a county, staying in the city.

Unlike the master's plan, which takes the Central Harlem district out of the city and out of New York County, this district is in New York County, with the one exception of Rikers Island. We did that simply because we needed population.

Turning now to district 16, here in the South Bronx, the purple district (indicating), again, the concentration map of Hispanics tells you what to do. Its voting age population is 49 percent.

At the VAP level, it is the same as Master Lacey's, but because Master Lacey exchanges South Bronx Hispanics, who are largely Puerto Rican, for Northern Queens Hispanics, who are largely non-Puerto Rican, noncitizens, nonregistered, nonparticipants in the political process, the VAP stays the same but our reg. is superior to his because we did the kind of locally intensive analysis that Thornburgh requires one to do.

And again I believe Mr. Baca's point there; I was pleased to hear what he had to say.

And again, having satisfied to the maximum extent the Voting Rights Act standard, we then looked at criterion three and chose to keep this district wholly in Bronx County, as compared to the master's plan, which includes three counties, and end up with a lower Hispanic registration. So that's 0 for 2 on that one.

Last of the seven minority districts: There is a black concentration here (indicating); it is an area currently represented in Assembly by Mr. Seabrook and in the City Council by Mr. Warden. And there is a concentration along the edge here; you can see it here (indicating); again, from the City Council experience, we know that as the district now represented by Reverend Foster -- Wendell Foster.

We linked that with a black population in Westchester County that is here (indicating) and that is here (indicating).

We produced a district that is 62 percent -- I'm sorry -- 72 percent, at the VAP level, minority; 26 percent black, 26 percent Hispanic.

All of the registration data that I've been referring to, your Honor, comes for the files of the New York City Districting Commission, which, of course, only attended to New York City. The registration analyses we did were -- was only for New York City.

So I can't tell you the registration for the entire district, but the New York City portion of that district, District 17, has a 59 percent minority registration. Four-fifths of the district is in The Bronx, and the black population in Westchester is much more akin in socioeconomic terms to the black population down here (indicating), middle class, home owners, than the black population in Central Brooklyn. And so, I think it's fair to project, but it is only a projection, that the registration of the district as a whole will be as high as we have estimated the registration for the New York City portion.

I think that is a district in which the minority communities, plural, have a realistic opportunity to express their choice. There is a nonminority incumbent in that district, and that's a distinct advantage. But I do believe that the minority communities, black and Hispanic, will have a real voice in that community.

In summary, both the plan that the referees have recommended to you and that the special master has

recommended to the federal Court have seven minority-majority districts. If one wants to guess at November, and that's all it is, your Honor, there are four strong African-American districts; there are two strong Hispanic districts; and there is one, this last one, 17, that's not clear in terms of the election result. But we're not here to do the work of the voters; we're here to give a level playing field to the voters. That is a district in which the minority community can exercise its choice.

Looking at criterion three, having met the Voting Rights Act standards, six of the seven minority districts, minority-majority districts, in the plan the referees are recommending to your are wholly in the city, while only five of seven of Master Lacey's.

Again, having met criterion two, I think it's appropriate to look at three. Four of the seven in the referee's plan, in their recommendation to you, are wholly in a single county of New York City; only two of the seven in the master's plan are wholly in the city.

Overall, looking at the population of all seven districts, the referees' plan vis-a-vis the master's plan, there are ten percent fewer whites in the master's plan -- I'm sorry -- in the referees' plan. Excuse me. That's done intentionally, for the reasons that I've mentioned before.

Overall, now looking at the five districts which have minority incumbents, the new districts in which those minority incumbents are resident, in which they may or may not choose to run -- their choice -- we have preserved the continuity of those five districts nearly twice as well as the master's plan. Seventy-six percent of the population in the five districts, in this plan, in which incumbent minority members are resident were in the districts of those incumbents previously, while in the master's plan, only 42 percent.

Again, that was done intentionally; we believe that's appropriate.

It's not incumbent protection, your Honor, at the expense of the Voting Rights Act; it's looking at continuity, having satisfied the Voting Rights Act.

In Southeast Queens, we've not packed the district; we've not broken the city line; we've not wasted, if you will, the Nassau blacks.

In Central Brooklyn, comparing the two districts in which the referees drew with the two districts that the master drew, those two districts, in the aggregate, are seven percent more black in the referees' plan and 27 percent fewer white. That's good on both sides of the equation, for the referees' plan.

In the so-called "tri-county district," District 12, it's equal to the master's plan in Hispanic VAP, it exceeds the master's plan in Hispanic reg., and at the same time triples the Asian VAP in that district.

And finally, in the South Bronx district, it exceeds the master's plan at the registration level and has half as many whites in that district. So I believe it makes it a much stronger district.

That completes my summary, your Honor.

Let me again express my appreciation for your allowing me to participate.

* * *
* * *

Appendix E

New York State Assembly
Two Hundred and Fifteenth Session
Excerpt from the Transcript
June 9, 1992, 8:46:30 pm
[pages 2-3]

* * *
* * *

ACTING SPEAKER GRABER: Mr. Gantt, explain the bill.

Visitors take seats.

MR. GANTT: Thank you very much, Mr. Speaker.

As most of you know, we have tried for sometime to try and negotiate a plan, along with the Senate, so that we could come up with a Congressional plan that would benefit the state of New York. Unfortunately, that was not able to come about because of a number of areas of disagreement about what we should do.

What I would like to do to start out is give you background about how this particular plan came about, of which the State Supreme Court developed, and while it is not the plan that the Speaker of this Assembly nor myself would have developed, unfortunately, we are stuck with a situation that this is the only game in town, and we must do that.

Just for your background, this plan was developed by a panel of three referees appointed by the state Supreme Court Justice, Justice James Shaw, pursuant to his order.

The plan according to the referees complies with the one person/one vote requirement of the United States Constitution, the Equal Rights Protection Clause of the 14th Amendment, and the federal Voting Rights Act. The maximum number of majority minority voting rights districts were created to ensure compliance with the Voting Rights

Act.

This plan contains three districts in which the voting age population is African-Americans, one in which 50 percent of the voting age population is Hispanic. The plan creates an additional district that will help to ensure the election of the minority community's candidate of its choice.

* * *
* * *

Appendix F

Puerto Rican Legal Defense and
Education Fund, Inc. v. Gantt,
CV-92-1521 (SJ)
and
Waring v. Gantt, CV-92-1776 (SJ)
Excerpts from Transcript of Hearing
before Special Master Frederick B. Lacey
May 18, 1992
[pages 12-18 and 88-91]

* * *
* * *

THE SPECIAL MASTER: Mr. Hedges

MR. HEDGES: I think the main features of the plan that was proposed are pretty straightforward in terms of equal population requirements. There is a one-person deviation throughout the state. The smallest district is one person larger than -- the largest is one person larger than the smallest.

With regard to incumbency and partisan fairness, I think if you look carefully at the plan, you will see that the plan is evenhanded with regard to the treatment of partisan incumbency.

When we look at the Voting Rights Act, I think we look at

the more significant difficulties in drawing districts within the state. And I think they start with the fact that voter turnout, particularly in primary elections, which are decision in the City of New York, are extraordinary law. There is no place else in the county where you see turnout levels of 3 and 4 and 5 percent deciding elections of statewide significance or citywide significance in a routine fashion.

And that happens in the City of New York. It's especially a problem in Brooklyn, the Bronx, what [sic] is true in other parts of the city as well. Pieces of Manhattan and certainly portions of Queens. With that thought in mind, districts are designed. Our plan is very conservative in its approach in allowing the minority community to elect candidates of their choice.

In the case of the Bronx, the district is 97 percent minority. That's because the minority population simply doesn't vote and a noticeable white population is quite likely to be victorious. I don't think we have a magic number in mind except to say the higher the white population gets, the more likely that problem is going to arise.

Moreover it's the case Hispanics and blacks don't vote together. So minority isn't the same as a community being able to select a candidate of its choice.

As we work through the details of things, I think we note in Manhattan we have not divided the Asian population that allows us to create a real new seat with a substantial minority population without deleteriously affecting the two existing Afro-American seats in Brooklyn.

Similarly in the Bronx, we have a Hispanic seat with a very, very high total minority population and to make sure the Hispanic community which votes in very, very low numbers, particularly in the primaries that are decisive, has a real opportunity to select candidates of their choice.

You certainly have had an opportunity to look at the numbers, I'm not going to try to go through the districts one

at a time, save to say it seems to me some comparisons are appropriate. This plan is very similar, certainly in its approach to that of the majority coalition. The differences are truly in the details.

I would make the same general observation with regard to some of the plans that we were -- that were made available to us concerning Hispanic districts in the Bronx from some of the Hispanic groups.

That having been said, it seems to us that the most conspicuous difference in approach is between us and the plan that was submitted by the Senate, and the big differences we think are in regards to the treatment of the two Afro-American seats in Brooklyn where one of those two seats has a very substantial high turnout, white population that would significantly endanger the Afro-American seat currently held by Major Owens.

We don't see incumbency protection as an issue, but we are very much concerned with retrogression. Certainly we agree that the creation of a paper second district in Bronx, Hispanic district, creates two districts with substantially higher white populations than can be permitted if the Hispanic communities are to be able to choose their elected representatives.

I think after that most of the rest of the differences between our plan and that proposed by the Senate are relatively small scale, and I would note a couple of things that seem to me to be in common with almost every plan, and that is there is the creation of a new Hispanic seat that goes from Brooklyn to Manhattan and Queens which has a very consistent configuration of the Lower East Side, pieces of Jackson Heights and the Bushwick-East New York sections of Brooklyn. I think that's probably it.

One other thing that is worth mentioning is it is possible to create a seat that has a higher Afro-american population than we did in our district that involves a current incumbent Charles Rangel. We felt that the current configuration which

is a seat wholly in a community called Harlem which has historically elected a black representative despite having lower black populations than Hispanic populations is something that we ought to honor, the community has consistently made those determinations and gratuitously rearranged those things in the name of increasing the numbers without increasing the opportunity for Afro-Americans to choose or Hispanics to choose, for that matter, in Harlem would be a policy mistake and risks retrogression.

* * *
* * *

CARVIN: Thank you. My name is Michael Carvin, I represent the Senate party, Ralph Marino in this case. I would like to focus first, talk first about the district that's received a lot of attention from the other commentators.

The senate plan, along with the assembly minority plan, is the only plan that creates seven minority districts in the city. As Mr. Faso pointed out, that's the only number that fairly reflects minority voting strength in New York City.

Under the other plans, two of 13 districts would equal about 15 percent of the congressional representation in the city, when we get that up to three of 13, it comes to about 23 percent which is just slightly below Hispanic representation in the city, which is approximately 24.4 percent of the city.

And the basic point, wholly apart from the fact that it reflects the representation of the city, is this third Hispanic district can be easily accomplished and it's very important to accomplish this, because you accomplish two things by creating the District 14 in our plan that is not present in the other plan.

What we do consistent with the Voting Rights Act is seek to group together concentrations of minority voters rather than split them apart, as is done certainly in the assembly plan and some of the others that have been presented.

In addition, just grouping together minority voters, because of the fact, as the assembly has pointed out already, that black and Hispanic voting patterns in the city are quite different. The legal term is there is a lack of cohesion between blacks and Hispanics in the city. Blacks will tend to support candidates over Hispanics and vise [sic] versa. It is very important to assure that each district minority group is a majority, an electoral majority in the district rather than submerging Hispanics into a black district or blacks in an Hispanic district which we seek to do when give [sic] each minority group a majority in a district.

The focus on the third Hispanic district that's been discussed is to take the Hispanic concentration in northern Manhattan and the Bronx and put them together in a district where they constitute a solid majority and, at the same time, this allows you to take the concentration of blacks in northern Manhattan in the Bronx and even reaching out into Westchester for the first time in Mount Vernon and New Rochelle and create a much more solid district.

Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ANGEL DIAZ, *et al.*,

Appellees,

vs.

SHELDON SILVER, in his official capacity as Speaker of the House for the Assembly of the State of New York, *et al.*,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

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The facts germane to appellees' Motion to Affirm (hereinafter "Motion") are fully set forth in appellant Sheldon Silver's Jurisdictional Statement (hereinafter "Silver Jurisd. St."). As shown therein, the critical issue in appellees' race-based constitutional challenge to New York State's legislatively enacted districting plan is whether "race was the predominant factor motivating the legislature's decision. . . ." *Miller v. Johnson*, 115 S. Ct. 2475, 2488 (1995); *see* cases cited at Silver Jurisd. St., pp. 6-7.

While not disagreeing that this is the test (*cf.*, Motion, p. 20), appellees' principal argument in support of their Motion is that the New York State legislature's motivation is to be determined (solely, simplistically and presumptively) on the basis of the districting plan's supposed racial effects. Ignoring this Court's jurisprudence demanding that a sensitive and searching factual inquiry be conducted when assessing a legislature's districting motivation, and relying instead on inapposite cases dealing with rules of statutory construction, appellees argue:

> The "intent" or "purpose" of legislation is always determined in the first instance by its facially evident content. . . . For example, a bill that authorizes highway construction is "intended" to authorize highway construction, and a bill that bans narcotics is "intended" to ban narcotics.
>
> In the same way, where districts are distorted in a manner that carefully includes and excludes members of particular races, they clearly were *intended* to perform this function. As with any other bill, the intent of a redistricting bill may be inferred from its contents.

(Motion, p. 19) (emphasis in original).

Having determined that legislative motivation is strictly a matter of construing a districting bill's content, appellees conclude with respect to the districting plan here at issue:

> Given the bill's content, all of Silver's arguments concerning the political circumstances surrounding the districting bill's passage are irrelevant.

(Motion, p. 20). Since the "content" of districting plans, including the one challenged here, typically make no reference to race, on their face they are racially neutral. By referring to the content of New York's districting legislation appellees obviously are alluding to the racial effects of the shape of the districting lines as enacted.

Appellees thus employ an "effects" test, as did the District Court, to determine legislative motivation. In so doing, appellees brush aside as "irrelevant" the complex procedural history and non-racial political considerations that culminated in the New York State legislature's decision to enact a districting plan. Appellees' "effects" approach to legislative motivation is completely at odds with and does violence to this Court's carefully considered pronouncements regarding (1) the sensitive and searching factual inquiry which must accompany a federal court's consideration of a state legislature's motivation in enacting a districting plan and (2) the fact that while the racial impact of a districting plan may be some evidence of a legislature's motivation in enacting a plan, it is in no way determinative of the legislature's dominant motivation. Appellees err, as did the District Court, in both respects.

I. A Federal Court's Review of a State Legislature's Districting Process Demands a Sensitive and Searching Factual Inquiry

In *Miller v. Johnson*, *supra*, this Court spoke generally of the careful inquiry that must be conducted when a federal court intrudes into the districting process, a sensitive area that is primarily the duty and responsibility of the states:

> Federal Court review of districting legislation represents a serious intrusion on the most vital of local functions. It is well settled that "reapportionment is primarily the duty and responsibility of the State."

115 S. Ct. at 2488.

The judicial inquiry that must be conducted into the districting process is all the more intricate and demanding when the issue under scrutiny is a legislature's alleged racial motivation. As stated in *Miller v. Johnson*:

> The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus. *Redistricting legislatures will,*

> *for example, almost always be aware of racial demographics; but it does not follow that race predominates in the districting process.* . . . The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a state has drawn district lines on the basis of race.

Id. (citations omitted)(emphasis added).

Miller v. Johnson's requirement for a searching and sensitive judicial inquiry into alleged invidious racial motivation by a state legislative body is not new. In the seminal case of *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), this Court similarly stated:

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action -- whether it "bears more heavily on one race than another," -- may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. The evidentiary inquiry is then relatively easy. But such cases are rare. Absent [such] a pattern *. . . impact alone is not determinative, and the Court must look to other evidence.*

Id. at 266 (footnotes and citations omitted)(emphasis added).

In *Arlington Heights* the Court went on to specify the nature of the evidence germane to a judicial inquiry into whether a legislature was motivated by invidious racial discrimination, namely, "[t]he historical background of the decision," "[t]he

specific sequence of events leading up to the challenged decision," and "[t]he legislative or administrative history," including "contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Id.* at 267-68.

Here, appellees ignore, as did the District Court, this Court's pronouncements mandating that there be a searching and sensitive inquiry into the circumstances surrounding the New York State legislature's enactment of the districting plan embodied in the *Reid* court's judgment. Were such an inquiry to be conducted, it would reveal that traditional, non-racial districting factors were the predominant and overriding considerations motivating the legislature's enactment of the plan here challenged by appellees (*see* Silver Jurisd. St., pp. 7-12). Those factors included primarily incumbency protection, as sworn to by the leadership of both chambers of the legislature, and as corroborated by contemporaneous newspaper reports of the events in question (*see* Silver Jurisd. St., pp. 9-12).

Appellees brazenly argue that all such "political considerations" are "irrelevant" (Motion, p. 20). As *Miller v. Johnson*, and *Arlington Heights* make clear, however, appellees are dead wrong. Political considerations are patently relevant to a judicial inquiry regarding legislative motivation. *See generally Bush v. Vera*, 116 S. Ct. 1941, 1952 (1996).

II. Racial Impact Is Not Determinative of Invidious Legislative Motivation

As indicated above, appellees see no need to look beyond the content of the districting plan itself to find conclusive evidence of allegedly invidious legislative discrimination in view of the districting plan's supposed racial impact. While impact may be evidence of a discriminatory purpose, this Court has made clear that it is by no means determinative.

As shown above, in *Arlington Heights* this Court held that discriminatory impact is only the "starting point" for analysis, not the end point posited by appellees. Indeed, in *Arlington Heights*, the Court of Appeals had made a specific finding

that "the village's decision carried a discriminatory 'ultimate effect'." 429 U.S. at 271. Notwithstanding such racial impact, the Supreme Court held that the Court of Appeals' finding of adverse discriminatory effects was "without independent constitutional significance" since plaintiffs had failed to sustain their burden of proving a discriminatory legislative purpose. *Id.* Impact clearly is not determinative of motive.

By focusing on impact rather than legislative motivation, appellees turn the constitutional problem on its head. The relevant question is whether New York State's legislature was motivated by a dominant, racially discriminatory motive in enacting the *Reid* court plan, not whether the plan as enacted is as "good," or as race-neutral, a plan as a federal court might have drawn. As *Arlington Heights*, *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1970) and *Miller v. Johnson* make crystal clear, it is the legislature's motivation that is at the heart of the constitutional inquiry, not the discriminatory effects of legislative action. Indeed, were it otherwise, the searching and sensitive inquiry into legislative motive demanded by this Court would not be at all necessary. The legislative plan, as enacted, would simply be judicially reviewed for its content to see if it were sufficiently race-neutral in its impact. Legislative motive under such circumstances would be irrelevant. The law, as stated again and again by this Court, unequivocally is otherwise (*see* cases cited at Silver Jurisd. St., pp. 6-7).

Appellees attempt to bootstrap their legislative motivation argument with the discredited premise that a legislature's knowledge of the discriminatory effects of its action supplies the requisite invidious motive (Motion, p. 19). This motive as "volition" or "awareness" theory has previously been debunked by this Court. As stated in *Miller v. Johnson*, *supra*, while "[r]edistricting legislatures will . . . almost always be aware of racial demographics [,] . . . it does not follow that race predominates in the districting process." 115 S. Ct. at 2488. "'Discriminatory purpose,' . . . implies more than intent as volition or intent as awareness of consequences." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. at 279

(1979). "('"[D]iscriminatory purpose" . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects')." *Miller v. Johnson*, 115 S. Ct. at 2488 (quoting *Personnel Adm'r of Mass. v. Feeney*, *supra*).

Appellees' effects-based approach to motive would lead to precisely what this Court has labored mightily to avoid -- thrusting federal district courts into the political thicket of drawing district lines based *not* upon (a) a sensitive and searching factual inquiry into a state legislature's motivation for acting or (b) an ensuing finding that the state legislature was motivated primarily by race, but based instead on a subjective determination that a legislatively enacted plan has too much racial impact. Such a standard affords no constitutional predicate for federal courts to intrude upon a quintessentially political process to which the states, as this Court repeatedly has held, are entitled to appropriate deference (*see* cases cited at Silver Jurisd. St., p. 25). That, however, is exactly the consequence of the effects-based approach adopted by the District Court and urged by appellees in their instant Motion. This Court has not countenanced such an approach in the past and it should not condone its use by the District Court here.

III. The Issue of the New York State Legislature's Alleged Racial Motivation Is Not Properly the Subject of Summary Disposition

Given the sensitive and searching factual inquiry that courts must conduct in assessing the issue of a legislature's racial motivation, it was particularly inappropriate for the district court to have disposed of that issue on a motion for summary judgment, particularly in the face of sworn statements by the legislature's leadership directly addressing the legislature's non-racial motives for enacting the *Reid* plan (*see* Silver Jurisd. St., pp. 9-12).

We have pointed out generally that issues of subjective intent or motivation rarely lend themselves to summary disposition (Silver Jurisd. St., p. 22). Summary disposition is particularly inappropriate where, as here, a court must ferret

out a legislative body's primary motivation amidst what typically is a complex of motivational factors in enacting a districting plan. As stated in *Arlington Heights*:

> Rarely can it be said that a legislative or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one.

429 U.S. at 265 (footnote omitted). Further:

> "The search for legislative purpose is often elusive enough without a requirement that primacy be ascertained. Legislation is frequently multipurposed. . . ."

Id. at 265 n.11 (citation omitted)(quoting *McGinnis v. Royster*, 410 U.S. 263, 276-277 [1973]).

The issue of ascertaining whether a legislature's primary motive for acting was racial is especially difficult in the districting context, wherein legislatures will "almost always be aware of racial demographics." *Miller v. Johnson*, *supra*, 115 S. Ct. at 2488. As further elucidated in *Miller v. Johnson*:

> The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This *evidentiary difficulty*, together with the *sensitive nature of redistricting* and the *presumption of good faith* that must be accorded legislative enactments, *requires courts to exercise extraordinary caution* in adjudicating claims that a state has drawn district lines on the basis of race.

Id. (emphasis added).

This Court's admonition that "extraordinary caution" be exercised by courts "in adjudicating claims that a state has drawn district lines on the basis of race," coupled with the "evidentiary difficulty" courts face in distinguishing between a legislature's awareness of race and being motivated to act

because of it, made it improper for the district court to have disposed of these issues on a motion for summary judgment. As we have noted (Silver Jurisd. St., p. 22), following *Shaw v. Reno*, 509 U.S. 630 (1993), no district court until now has declared district lines unconstitutional without a hearing or trial. The appropriate procedure for resolving the issue of the New York State legislature's alleged racial motivation required a trial. *See*, for example, the searching factual inquiry reflected in the plurality opinion in *Bush v. Vera*, 116 S. Ct. 1941 (1996).

Here, summary judgment was all the more inappropriate in view of the sworn submissions of Ralph Marino, the New York State Senate Majority Leader, and Benjamin Chevat, the Chief Counsel to the Speaker of the New York State Assembly, that the legislature enacted the *Reid* judgment to protect New York's Congressional delegation from implementation of the *PRLDEF* court's incumbent-unfriendly districting plan. Race was not the reason for the enactment (Silver Jurisd. St., pp. 9-10).

Appellees attempt to counter this evidentiary showing by pointing to the absence of any evidence that in crafting the 12th Congressional District racial considerations were subordinated to incumbency (Motion, pp. 20-21). There was no evidentiary showing below, however, that the New York State legislature focused specifically on the 12th Congressional District, or any other district, in enacting the state court's plan. There was evidence to show, on the other hand, that the state court's plan, including the 12th Congressional District, was enacted in its entirety by the legislature motivated primarily by considerations of incumbency protection, not race (*see* Silver Jurisd. St., pp. 7-12).

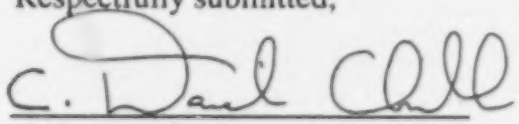
In short, the legislature adopted a full 31-district plan for incumbency protection purposes. It never focused on the 12th Congressional District as such. In the face of such compelling

evidence the District Court erred in granting summary judgment declaring the district unconstitutional.[1]

CONCLUSION

In view of the foregoing, appellees' motion should be denied, and the judgment of the District Court should be reversed and the case remanded to the District Court for a full trial with respect to the legislature's motivation in enacting the Congressional districting plan at issue in this case.

Respectfully submitted,



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July 21, 1997

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[1] Appellees argue they are not personally bound by the *Reid* court judgment because they are not in privity with any party to that action and no class was ever certified (Motion, pp. 24-26). Under New York law, however, *de facto* class actions, such as the *Reid* action in which jointly held constitutional rights were adjudicated, do have *res judicata* effect notwithstanding the absence of formal class certification (*see* Silver Jurisd. St., p. 26), *Ferris v. Cuevas*, No. 96-9406 (2d Cir. July 3, 1997) (concurring opinion of Judge Kearse at p. 4560).